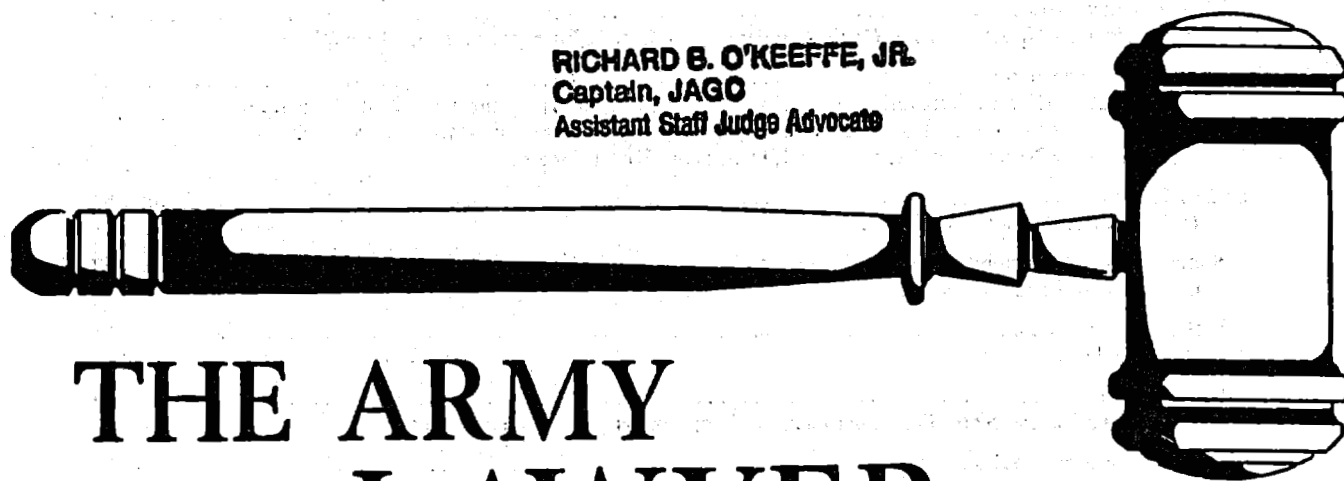


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Editor

Captain David R. Getz

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Recent Developments in Contract Law—1987 in Review*

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Introduction

In 1987, for the first time in several years, Congress enacted few legislative controls and changes to the federal procurement system. Perhaps the lack of legislative activity resulted from Congress's desire to give federal agencies some "breathing room" and time to implement the various changes from past years, or perhaps it was because this particular Congress has had trouble agreeing on anything. Nevertheless, the year was an interesting one, with many new regulations to implement past changes, some new protest rules at the General Accounting Office (GAO), and significant jurisdictional and substantive developments in the various forums in which contract disputes and protests are litigated. The practice of government contract law remains dynamic, which allows us to select and discuss a wide variety of subjects in this article in an attempt to keep contract attorneys in the field updated.

The items discussed herein have been selected for their general interest and significance or because they affect the contracting process and the contract attorney. The discussion of these items is not intended to be exhaustive, but rather is intended to inform you generally of the developments in government contract law in 1987.

Statutory and Regulatory Changes

National Defense Authorization Act for Fiscal Years 1988 and 1989

Biennial Budgeting

On 4 December 1987, President Reagan signed into law the National Defense Authorization Act for Fiscal Years 1988 and 1989.¹ One of the most noteworthy aspects of this Act is that it covers two years instead of one. This was done to comply with the FY 1986 DOD Authorization Act,² which required the Department of Defense (DOD) to submit a biennial authorization request. The intent of biennial budgeting is to improve program stability for defense programs, improve the quality of congressional oversight, and reduce the recurring delays in the appropriations process.

Because of many problems in completing the first biennial budget, Congress was unable to authorize a complete fiscal year 1989 program. The FY 1988/1989 DOD Authorization Act authorizes appropriations only for fiscal year 1988 for military activities of the Department of Defense, and for military construction. It also prescribes

personnel strengths for the Armed Services during fiscal year 1988, and authorizes appropriations for fiscal year 1989 for certain specified activities of the Department of Defense. The budget for fiscal year 1989 will be changed when DOD submits a revised budget for next year. Overall, this is a good start toward providing long-term stability for key defense programs. Some of the more significant provisions that may affect the contract attorney or the procurement process are discussed below.

OMA Funding of Investment Items

In past DOD authorization acts, Congress placed a \$3,000 limit on the use of Operation and Maintenance appropriations (OMA) to purchase investment items. Then, the FY 1986 Authorization Act³ raised the limit to \$5,000 for FY 1986. The FY 1987 DOD Authorization Act⁴ contained no provision at all for the use of OMA funds in this manner, meaning technically that no OMA funds could be used to purchase investment items. Now, Section 303 of the FY 1988/1989 DOD Authorization Act raises this limit to \$15,000 for fiscal years 1988 and 1989, and restores the \$5,000 limit for fiscal year 1990. To make this limit more uniform in future years, Congress will ask GAO to study the issue in FY 1988 and make a recommendation as to what the limit should be.

Nonappropriated Fund Instrumentalities

Last year, we reported that section 313 of the FY 1987 DOD Authorization Act⁵ created 10 U.S.C. § 2488, which requires that purchases of alcoholic beverages by nonappropriated fund instrumentalities (NAFI) for resale at installations within the continental United States be from the most competitive source, price and other factors considered. As an exception to this requirement, malt beverage and wine purchases for resale within the contiguous states must be obtained from "a source within the State in which the installation is located." Section 312 of the FY 1988/1989 DOD Authorization Act extends the exception concerning the local procurement of malt beverages and wine to Alaska and Hawaii.

Survivability and Lethality Testing

Section 802 of the FY 1988/1989 DOD Authorization Act amends 10 U.S.C. § 2366 (West Supp. 1987), which pertains to survivability and lethality testing of major systems and major munitions or missile programs and to operational testing of major defense acquisition programs.

*This article was originally prepared for and presented to the 1988 Government Contract Law Symposium at the U.S. Army Judge Advocate General's School held 11-15 January 1988.

¹ Pub. L. No. 100-180, 101 Stat. 1019 (1987) [hereinafter the FY 1988/1989 DOD Authorization Act].

² Pub. L. No. 99-145, 99 Stat. 689 (1986).

³ *Id.* § 303.

⁴ Pub. L. No. 99-661, 100 Stat. 3816 (1986).

⁵ Pub. L. 99-661, § 313, 100 Stat. 3816, 3852 (1986).

Section 802 provides that "covered" major product improvement programs may not proceed beyond low-rate initial production until realistic survivability and lethality testing have been completed. "Covered" product improvement programs are defined as modifications or upgrades to covered major systems or major munitions or missile programs that are likely, as determined by the Secretary of Defense, to affect significantly the survivability or lethality of such systems or programs. Section 2366 prohibits the involvement of personnel employed by the contractor in the operational testing and evaluation of a major defense acquisition program. But Section 802 of the Act provides that this limitation does not apply if contractor personnel will be involved in the operation, maintenance, and support of the system being tested when the system is deployed in combat.

Section 802 also requires that waivers of survivability and lethality testing must now include a report on how the Secretary of Defense plans to evaluate the survivability and lethality of the system or program, and must assess possible alternatives to realistic survivability testing of the system or program. Finally, Section 802 requires that, at the conclusion of survivability or lethality testing, a report on the testing must be provided to Congress.

Truth in Negotiations Act Amendments

Several previous DOD authorization acts have contained amendments to the Truth in Negotiations Act.⁶ Section 952 of last year's Authorization Act⁷ codified the definition of "cost or pricing data" found in FAR § 15.801.⁸ Explanatory statements and examples in the legislative history of what Congress considered to be "cost or pricing data," however, created more confusion than clarity in the distinction between "factual" data, which contractors are required to disclose to the government during contract negotiations, and "judgmental" data, which they are not.⁹ Section 804 of the FY 1988/1989 DOD Authorization Act was adopted to clear up the confusion. It amends the definition of "cost or pricing data" in 10 U.S.C. § 2306a to mean

all facts that, as of the date of agreement on price of a contract (or the price of a contract modification), a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.

The provision is intended only to codify, without substantive change, the definition contained in FAR § 15.801.

⁶ 10 U.S.C.A. § 2306a (West Supp. 1987).

⁷ Pub. L. No. 99-661, § 952, 100 Stat. 3816, 3949 (1986).

⁸ Federal Acquisition Reg. § 15.801 (1 Apr. 1984) [hereinafter FAR]. The Defense FAR Supp. (1 Apr. 1984) and the Army FAR Supp. (1 Dec. 1984) will be cited as DFARS and AFARS, respectively.

⁹ See H.R. Rep. No. 99-1001, 99th Cong., 2nd Sess. 509-10 (1986).

¹⁰ Pub. L. No. 99-661, § 1207, 100 Stat. 3816, 3973 (1986).

¹¹ 15 U.S.C. § 637(a) (1982).

¹² 52 Fed. Reg. 16,263 (1987) (to be codified at 48 C.F.R. pts. 204, 205, 206, 219, and 252).

¹³ FAR § 19.502-2.

¹⁴ 52 Fed. Reg. 16,265 (1987) (to be codified at 48 C.F.R. § 219.001 (DFARS § 19.001)).

¹⁵ Small purchase procedures are for contracts not expected to exceed \$25,000; see FAR part 13.

Golden Parachutes

Recent DOD authorization acts have contained numerous provisions covering the allowability of specific costs under a cost type contract or modification. The FY 1988/1989 DOD Authorization Act contains only one such new provision, section 805, which disallows any payment to an employee that would be considered a "golden parachute." A "golden parachute" is defined as any agreement to pay a senior employee a severance payment in excess of what would normally be paid if the company is subject to a change in ownership.

Small Disadvantaged Business Set Asides

Background: The Establishment of DOD's New Small Disadvantaged Business Set Aside Program. Last year, we reported that section 1207 of the FY 1987 DOD Authorization Act¹⁰ established an objective for the Department of Defense of awarding five percent of its contract dollars during fiscal years 1987, 1988, and 1989 (approximately \$5 billion per year) to "small disadvantaged business concerns" (SDBs). SDBs are defined in the same manner as those firms qualifying as "8(a) contractors" under section 8(a) of the Small Business Act:¹¹ they must be owned and controlled by socially and economically disadvantaged persons. Prior to Fiscal Year 1987, DOD was nowhere near this goal using only the 8(a) program, so something had to be done. DOD's solution was to establish the SDB set aside program. Interim rules were issued on 4 May 1987, which amend the DFARS where appropriate.¹²

Content of DOD's Small Disadvantaged Business Set Aside Program. Effective for all solicitations issued on or after 1 June 1987, the SDB set aside program is similar to those for labor surplus area concerns and for small businesses. The set aside is total (as opposed to partial), meaning that DOD must limit competition to small disadvantaged business concerns, historically Black colleges and universities, and minority institutions if the three conditions that follow are met.

First, the contracting officer must determine that there is a reasonable expectation of competition (i.e., bids or offers) from two or more SDB concerns. This "rule of two" should be familiar: it is similar to that used for total small business set asides.¹³ Second, the contracting officer must reasonably expect that the award price will not exceed the "fair market price" by more than ten percent. "Fair market price" is defined in the interim rules as a price based on reasonable costs under normal competitive conditions and not on lowest possible costs.¹⁴ The last condition is that small purchase procedures¹⁵ must not be used. Small purchases

must be totally set aside for small businesses anyway,¹⁶ and to allow SDB set asides for these would in effect have penalized small businesses as a class.

The SDB set aside program is not intended to displace the section 8(a) program, although in some cases, such as when two 8(a) contractors request that the acquisition be placed in the 8(a) program, the contracting officer must instead set it aside for SDB concerns.¹⁷

Results of the SDB Set Aside Program, and Changes Mandated by the FY 1988/1989 DOD Authorization Act. In part because the SDB set aside program got started late in the fiscal year, the five percent goal for FY 1987 was not met. The actual figure for DOD was 2.3% (3.7% for the Army), up from 2.1% in FY 1986.¹⁸ Congress therefore included a requirement for "substantial progress" in reaching the goals for FY 1988 and FY 1989 in section 806 of the FY 1988/1989 DOD Authorization Act. The provision contains no real substantive changes to § 1207(a) of the FY 1987 DOD Authorization Act,¹⁹ however, in part because Congress recognized the need to allow DOD's program a chance to get into full operation before assessing its success or failure. But the section *does* mandate some more DOD regulations to provide further guidance to DOD's SDB set aside program, in the hope that DOD can achieve more "substantial progress" in reaching the § 1207(a) goals. The new regulations must include provisions concerning advance payments, subcontracting plans and incentives to reach subcontracting goals, and technical assistance to SDB concerns. Also, guidance must be issued to define the relationship between the SDB set aside program, the small business set aside program, and the section 8(a) program. The new SDB set aside program must provide *new* opportunities for contract awards, and must not affect the procurement process, or current levels of awards, in the other two programs. And finally, DOD's SDB set aside program must provide for partial set asides, something that it does not currently do.

Rights in Technical Data

Under 10 U.S.C. § 2320 (West Supp. 1987), the Secretary of Defense is required to promulgate regulations defining the rights of the government and contractors with respect to technical data. Section 808 of the FY 1988/1989 DOD Authorization Act amends 10 U.S.C. § 2320 to require that DOD regulations may not impair a contractor's or subcontractor's right to receive a fee or royalty from a third party for use of technical data developed exclusively at private expense. Section 808 also requires that the rights in technical data be based upon negotiations between the government and contractors, except in cases where the Secretary of Defense determines, on criteria established in the regulations, that negotiations would not be practicable. Additionally, section 808 authorizes the Secretary of Defense to permit, if

necessary to develop alternate sources, a contractor or subcontractor to license directly to a third party the use of technical data which the contractor is otherwise allowed to restrict. Finally, in defining "exclusively with Federal funds" and "exclusively with private funds," section 808 prohibits independent research and development (IR&D) and bid and proposal (B&P) costs from being considered federal funds.

Small Business Set Aside Program Amendments

Although Congress considered several amendments to section 15 of the Small Business Act²⁰ and section 921 of the Defense Acquisition Improvement Act of 1986,²¹ only two were adopted in section 809 of the FY 1988/1989 DOD Authorization Act. The first repealed the requirement that contracting officers disclose the identity of firms expected to be solicited under a set aside. The other repealed the requirement to establish small business goals below the small purchase threshold of \$25,000. The provisions from section 921 that remain intact include using each "industry category" to measure the fair proportion of contract awards to small businesses, the definition of "fair market price," and the requirement on a small business to perform a specific percentage of the contract with its own employees. Federal Acquisition Circular (FAC) 84-31, 14 Oct. 1987, implemented most of these provisions in the FAR.²²

Special Tooling and Test Equipment

Section 810 of the FY 1988/1989 DOD Authorization Act clarifies the law with respect to payments for special tooling and test equipment. The government must fully reimburse the contractor for special tooling and test equipment if the government does not intend to make future purchases of the same or similar items being purchased under the contract from the contractor. If the government plans to make future purchases, then the contractor must be reimbursed immediately for at least fifty percent of the cost of the tooling or equipment, with the remainder of the cost amortized over a mutually agreed upon schedule. The rules do not apply if the cost of the tooling and equipment does not exceed \$1,000,000, and exceptions to the fifty percent rule may be granted on a case-by-case basis.

Conflict of Interest Provisions

Two provisions in the FY 1988/1989 Act attempt to clarify certain post-government employment provisions in defense procurement. Section 821 of the Act clarifies the term "a primary representative" in the context of the two-year employment ban with certain DOD contractors²³ to apply to one or more persons if they acted as one of the primary representatives. Section 822 of the Act amends section 281 of title 18, United States Code, which prohibits

¹⁶ FAR § 13.105.

¹⁷ 52 Fed. Reg. 16,266 (1987) (to be codified at 48 C.F.R. § 219.502-72(b) (DFARS § 19.502-72(b))).

¹⁸ Fed. Cont. Rep. (BNA) No. 48, at 663 (Nov. 2, 1987).

¹⁹ Pub. L. No. 99-661, § 1207(a), 100 Stat. 3816, 3852 (1986).

²⁰ 15 U.S.C.A. § 644 (West Supp. 1987).

²¹ Pub. L. No. 99-661, tit. IX, 100 Stat. 3816, 3926 (1987).

²² See, e.g., FAR § 19.001 (definition of "fair market price"); FAR § 52.219-14, Limitations on Subcontracting (Oct. 1987) (minimum percentages for performance with contractor's own employees).

²³ See Defense Acquisition Improvement Act of 1986, Pub. L. No. 99-661, § 931, 100 Stat. 3816, 3936 (1986).

retired military officers from representing a contractor in sales to the officer's former branch of service, by limiting the application of this provision to the two-year period beginning on the date the officer retired. This amendment creates uniformity in the application of similar conflict of interest provisions concerning former civilian employees, retired reserve officers, enlisted military members, and former military personnel who have not retired.

Commercial Activities Program

The FY 1988/1989 DOD Authorization Act contains three provisions that will affect the Army's Commercial Activities Program. First, section 1111 directs the Secretary of Defense to delegate to the commander of each military installation the authority to decide which commercial activities at the installation will be reviewed under the commercial activities procedures. This authority, however, will expire on 1 October 1989. Second, section 1112 of the Act adds security guard functions to § 2693 of title 10, United States Code, meaning that, along with fire fighting functions, we are permanently prohibited from contracting out these functions at military installations. Finally, section 314 requires that not less than sixty percent of funds appropriated for Army depot maintenance be used to perform depot work in-house by military or DOD civilian personnel. The intent behind this requirement is to stabilize and reverse the downward trend in the Army's organic capability and depot level employment. Another provision that would have prohibited the contracting out of maintenance functions at twenty Army depots and arsenals, however, was not adopted.

Military Construction Program Provisions

Guard and Reserve Minor Construction. Section 2304 of the FY 1988/1989 DOD Authorization Act amended 10 U.S.C. § 2233a by increasing the Guard and Reserve funding threshold from \$100,000 to \$200,000 for minor construction projects using operation and maintenance account (O&M) monies. This makes the Guard and Reserve O&M minor construction threshold the same as for the active military components. The amendment applies to projects for which contracts are entered into on or after the date of the Act.

Family Housing Improvement Threshold. Section 2305 of the Act amended 10 U.S.C. § 2825(b)(1) by increasing the threshold for family housing improvements from \$30,000 per single family housing unit to \$40,000 per unit.

Family Housing Leasing and Rental Guarantee Programs. Section 2306 of the Act amended 10 U.S.C. § 2828(g) by extending the family housing leasing program to units that are "rehabilitated to residential use" in addition to those units that are "constructed." Section 2307 of the Act amended section 802 of the Military Construction Authorization Act,²⁴ to extend the family housing rental guarantee program to rehabilitated units, as well as existing units.

²⁴ 10 U.S.C. § 2821 note (Supp. III 1985).

²⁵ Pub. L. No. 100-202, 101 Stat. ____ (1987).

²⁶ 133 Cong. Rec. H12,485, H12,737 (daily ed. Dec. 21, 1987, pt. III).

Cost Threshold For Family Housing Leased Abroad. Section 2309 of the Act amended 10 U.S.C. § 2828(e) to increase the foreign family housing rental threshold from \$16,800 to \$20,000 per unit. The cost threshold for congressional notification for leasing new family housing facilities overseas was increased from \$250,000 to \$500,000 per year.

Minor Construction Outside the United States. Section 2310 of the Act amended 10 U.S.C. § 2805(c) to prohibit any minor construction related to Joint Chief of Staff-directed exercises outside the continental United States from being funded from operations and maintenance (O&M) minor construction accounts. Instead, all exercise-related minor construction must be funded from unspecified minor construction accounts of the military departments. Furthermore, the authority for exercise-related construction is limited to no more than \$5 million per department. The amendment codifies the practice the Army followed last year and extends the practice to the other military departments. The amendment does not, however, affect funding of minor and temporary structures such as tent platforms, field latrines, shelters, and range targets that are completely removed once the exercise is completed. These may continue to be funded through O&M accounts.

Cost Variations. Another area of significant change is the provision relating to authorized cost increases for military construction projects, and the notice requirements when this authority is used. Section 2312 of the Act amended 10 U.S.C. § 2853(a)(1) to change the focus of the cost variation authorization and reporting thresholds from the appropriated value of an individual project to the total value of the military construction projects authorized at an installation. The amendment permits the total cost authorized for military construction projects at an installation to be increased by not more than twenty-five percent of the total amount appropriated for such projects, or twenty percent of the amount specified by law as the maximum amount specified for a minor military construction project, whichever is less. Cost variation reports to Congress are required when the cost of the aggregate authorized construction projects at an installation exceeds 125% of the authorized value, or 200% of the amount specified by law as the maximum amount for a minor construction project, whichever is less. This amendment should improve the efficiency of the military construction program by simplifying the approval process, and by providing increased flexibility to field managers.

Family Housing Improvements. Section 2313 of the Act amended 10 U.S.C. § 2853 to include family housing improvements under the cost variation authority that applies to other military construction projects.

Department of Defense Appropriations Act, 1988

General

The Department of Defense Appropriations Act, 1988,²⁵ appropriates new budget authority for Fiscal Year 1988 for all DOD programs, except military construction, which is provided for in the Military Construction Appropriations Act, 1988.²⁶ Some of the more important provisions for procurement attorneys follow.

Foreign Currency Fluctuation

The Military Construction Appropriations Act appropriates budget authority to the Foreign Currency Fluctuation Account (FCFA). There was no restoration of an earlier reduction in the FCFA, and the House and Senate Conferees are aware that the funding shortfall in fiscal year 1988 due to foreign currency losses may be higher than the appropriation. Accordingly, Congress provided transfer (reprogramming) authority to DOD so that the shortfall can be met by appropriation transfers from other accounts.

Exercise-Related Construction

The Military Construction Appropriation Act appropriates limited budget authority to DOD unspecified minor construction accounts for exercise-related construction outside the United States. This is the only appropriation available for this type of construction in FY 1988, because the FY 1988/1989 DOD Authorization Act prohibits the funding of exercise-related construction from O&M accounts. For next year, Congress directed DOD to include line items for exercise-related construction in the fiscal year 1989 budget submission in order to avoid funding such construction from the unspecified minor construction account.

Unsolicited Proposals

Section 8029 of the Department of Defense Appropriations Act, 1988, prohibits contracts for studies, analyses, or consulting services entered into without competition on the basis of unsolicited proposals unless the responsible head of the activity makes certain acquisition determinations: as a result of thorough technical evaluation, only one source is found fully qualified to perform the proposed work; the purpose of the contract is to explore an unsolicited proposal that offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source; or where the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to ensure that a new product or idea of a specific concern is given financial support. These determinations, however, are not necessary for small purchases, and when it is not in the interests of national defense.

Commercial Activities

Section 8074 of the Department of Defense Appropriations Act, 1988, mandates the development of a most-efficient and cost-effective organization before conversion to contract when there are more than ten civilian employees.

Obligation Rates

Congress continues the pressure to meet obligation rates. Section 8009 of the Department of Defense Appropriations Act, 1988, states that no more than twenty percent of the annual (one-year) appropriations provided in the Act may be obligated during the last two months of fiscal year 1988. There are a few narrow exceptions.

²⁷ FAR § 31.205-38(b) as in effect on April 1, 1984.

²⁸ 10 U.S.C. § 2324(e)(1)(H), as noted in 133 Cong. Rec. H12,413 (daily ed. Dec. 21, 1987, pt. III).

²⁹ See FAR § 31.205-38(b).

³⁰ See Pub. L. No. 100-180, § 312, 101 Stat. 1019 (1987), and *supra* note 5 and accompanying text.

³¹ FAR § 35.006; see also Dep't of Defense Directive No. 5000.1, Major and Non-Major Defense Acquisition Programs (Sept. 1, 1987).

Foreign Selling/Advertising Costs

Section 8062 of the Act continues the 1984²⁷ restriction against reimbursing contractors for foreign selling costs, but waives the advertising restriction²⁸ for reasonable costs associated with international and domestic aerospace exhibitions.²⁹ The provision intends to provide incentives to contractors to increase sales of U.S. products overseas, thus driving down the costs of goods sold to DOD, and increasing commonality of weapons systems among our allies.

Nonappropriated Fund Instrumentalities

Section 8081 of the Act restates the requirement that no appropriated fund support can be given to a nonappropriated fund activity that procures malt beverages and wine for resale on a military installation unless the beverage or wine was purchased from a source within the state (or District of Columbia) in which the military installation is located.³⁰

Acquisition and Importation Prohibition

Section 8124 of the Act prohibits DOD from procuring either directly or indirectly any goods or services from Toshiba Corporation or any of its subsidiaries, or from Kongsberg Vapenfabrikk or any of its subsidiaries. The Secretary of Defense may waive the prohibition if he determines that the national security would be adversely affected, and so notifies Congress. Section 8129 of the Act prohibits the purchase or sale in commissaries or exchanges of products produced by Toshiba Corporation.

Fixed Price Development Contracts

Section 8118 of the Act prohibits DOD from awarding a fixed price contract in excess of \$10 million for development of a major system or subsystem "unless the Undersecretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable adjustment and sensible allocation of program risk between the contracting parties." This prohibition applies only to those contracts funded by the Department of Defense Appropriations Act, 1988. The decision to award a fixed price development contract may not be delegated below the level of Assistant Secretary of Defense. Furthermore, the Undersecretary of Defense must report to Congress, on a quarterly basis, all fixed price development contracts awarded. This provision follows criticism in Congress and DOD of the Air Force's and Navy's widespread use of fixed price development contracts. It also refines the FAR policy that cost type contracts are usually more appropriate for development contracting due to program risk and uncertainty.³¹

Regulatory Changes

Evaluation Criteria

FAR § 15.605(b) was amended by Federal Acquisition Circular 84-28, 9 June 1987, to implement section 924 of

the Defense Acquisition Improvement Act of 1986.³² The amendment specifies that the evaluation factors to apply in a negotiated acquisition "are within the broad discretion of agency acquisition officials." The amendment requires, however, that quality *must* be addressed in every negotiated acquisition. As an evaluation factor, it may be expressed in several ways, including technical management capability, personnel qualifications, prior experience, past performance, and schedule compliance.

Rights in Technical Data

We reported last year that section 953 of the FY 1987 DOD Authorization Act³³ required DOD to prescribe regulations defining the rights of the government and contractors with respect to technical data. On 16 April 1987, the DAR Council issued its final rules governing technical data rights. The rules took effect on 18 May 1987.³⁴ Stating that the DOD policy is that the government will only acquire data rights essential to meet its minimum needs, the DOD version creates three categories of rights in technical data. First, the government is entitled to (and will acquire) unlimited rights if it has funded or will fund the entire development of the item or process. Second, if the development is by the contractor exclusively at private expense (as defined in the regulations), the government is entitled to limited rights. The third category covers the situation where the contractor and the government share in the development and is called "government purpose license rights."³⁵ Government purpose license rights allow contracting officers flexibility to secure only those rights deemed necessary or needed by the government. They are also favorable to contractors because they allow ownership of data to remain with the contractor, although the government has a royalty-free license to use the data.

Changes Clause

FAR clauses 52.243-1, 52.243-2, 52.243-3, and 52.243-4 were amended on 24 August 1987 to reinstate the pre-FAR requirement that the contractor must "assert its right to an adjustment" rather than "submit its proposal for adjustment" within thirty days from the receipt of a written order.³⁶ The amendments were made to correct an unintended policy change that occurred during the drafting of the FAR. The changes were not intended to relax FAR § 43.204, which requires the prompt definitization of un-priced change orders. What impact, if any, these amendments will have remains to be seen.

Cost Accounting Standards

Final rules have been issued incorporating the Cost Accounting Standards (CAS) into the FAR.³⁷ The regulations took effect on 30 September 1987. From now on, changes or revisions to the CAS will be processed under the normal procedures for revising the FAR. Substantively, the CAS as incorporated remain essentially unchanged in the FAR. The Office of Management and Budget approved this action when it was proposed. There is the possibility, however, that legislation to reauthorize the Office of Federal Procurement Policy (OFPP),³⁸ passage of which is by no means certain, will assign the CAS function to OFPP.

Reasonableness of Costs

In a landmark change in the approach to proving the reasonableness of costs, FAR § 31.201-3 has been amended to reflect a change in the burden of proving cost reasonableness. Previously, a contractor's actual costs were presumed to be reasonable, and the government in challenging a cost as *not* reasonable had the burden of overcoming that presumption.³⁹ Now, however, the burden has been shifted to the contractor, so that if the contracting officer challenges a specific cost, the contractor must establish its reasonableness. In other words, the presumption of reasonableness has been abolished. The amendment was considered necessary to ensure that only reasonable costs are paid under government contracts.⁴⁰

Federal Supply Schedules

Pursuant to an agreement between DOD and the General Services Administration (GSA), DOD will no longer be a mandatory user on Federal Supply Schedules. This new policy is a result of a DFARS change giving optional Federal Supply Schedules a preference for use over open market sources, thus removing the requirement to seek further competition beyond those schedules.⁴¹ Because of this preference, there is no longer a need to force DOD to use the schedules on which it had been a mandatory user. The new policy is effective 1 August 1987 and will apply to each mandatory schedule as it expires. The sole exception to this policy is for Federal Supply Group 68 covering chemicals and gases, and services for maintenance, repair, rehabilitation, and reclamation of personal property.⁴²

Conflicts of Interest in Defense Procurement

Last year, Congress strengthened the post-government employment restrictions for certain government officials in section 931 of the Defense Acquisition Improvement Act of

³² Pub. L. No. 99-661, § 924, 100 Stat. 3816, 3932 (1986).

³³ Pub. L. No. 99-661, § 953, 100 Stat. 3816, 3949 (1986).

³⁴ Defense Acquisition Circular (DAC) 86-3, 15 May 1987; 52 Fed. Reg. 12,391 (1987); see DFARS subpart 27.4. (Note: The civilian agency counterpart rules were issued on 13 May 1987, and took effect on 1 June 1987, except for in NASA where they did not apply until 31 December 1987. Federal Acquisition Circular (FAC) 84-27, 13 May 1987; see FAR subpart 27.4).

³⁵ See DFARS § 27.472-5.

³⁶ FAC 84-29, 12 Aug. 1987; 52 Fed. Reg. 30,074 (1987).

³⁷ FAC 84-30, 22 Sept. 1987.

³⁸ H.R. No. 2539, 100th Cong., 1st Sess. (1987). See Fed. Cont. Rep. (BNA) No. 48, at 444 (Sept. 28, 1987).

³⁹ See *Bruce Constr. Corp. v. United States*, 324 F.2d 516 (Ct. Cl. 1963).

⁴⁰ FAC 84-26, 27 May 1987; 52 Fed. Reg. 19,801 (1987).

⁴¹ DAC 86-2, 15 Mar. 1987; DFARS § 8.404-2(a)(70).

⁴² DAC 86-6, 1 Sept. 1987; DFARS § 8.404-70.

1986.⁴³ On 16 April 1987, the DAR Council issued interim rules concerning these restrictions. The rules implement the prohibition against major defense contractors offering or providing compensation either directly or indirectly to certain DOD officials who, within two years prior to their separation from DOD, had certain procurement responsibilities with respect to that contractor.⁴⁴ The rules also adopt a contract clause⁴⁵ that requires major defense contractors to report annually concerning any compensation provided, and makes them subject to liquidated damages for knowing violations of the prohibition.

Undefinitized Contract Actions

Last year, Congress included several limitations on the use of undefinitized contract actions in section 908 of the Defense Acquisition Improvement Act of 1986.⁴⁶ On 16 April 1987, the DAR Council issued interim rules that implement these limitations in new DFARS subpart 17.75. The limitations require prior high level approval of the action, a ceiling on price, a definitization schedule of not more than 180 days, and limits on allowable profit to reflect the contractor's reduced cost risk. Also, obligations and expenditures on undefinitized contract actions prior to definitization are limited to fifty percent of the ceiling price.

Business Clearance Memorandums

Acquisition Letter 87-21, 24 July 1987, replaced the Army's Board of Awards procedure, whose purpose was to review and approve for award most negotiated contracts and modifications expected to exceed \$100,000, with what is called "Business Clearance Policy and Procedures." AFARS § 1.691 now requires the contracting officer or the government's negotiator, for the same types of contracts and modifications, to prepare two Business Clearance Memorandums (BCM), one pre-negotiation and one post-negotiation. The pre-negotiation BCM should demonstrate the negotiator's preparedness to enter into negotiations, while the post-negotiation BCM should show the results of the negotiations and demonstrate them to be fair and reasonable. Both BCMs must be reviewed and approved at levels higher than the negotiator—the level depends upon the amount of the contract or modification. Heads of Contracting Activities are authorized to establish Contract Review Boards to review BCMs and contract documents prior to their approval and contract award. These Contract Review Boards thus take the place of Boards of Awards, and essentially provide the necessary check in the system to help prevent potentially unwise or illegal procurements.

Progress Payment Rates

Acquisition Letter 87-39 clarified the progress payment rates applicable to DOD contracts. Previously, Acquisition

Letter 86-41 lowered these rates for DOD contracts, pursuant to section 9105 of the FY 1987 Omnibus Appropriations Act,⁴⁷ to 75% for large businesses and 80% for small businesses. Then, Federal Acquisition Circular 84-29, 12 August 1987, revised FAR § 32.5, stating the rates as 80% for large businesses (down from 90%) and 85% for small businesses (down from 95%). Acquisition Letter 87-39 apologizes for the mix-up and tells DOD to follow the statutorily-based rates in Acquisition Letter 86-41 until DFARS changes can be made.

Anti-Kickback Rules

Last year, we reported that Congress amended the Anti-Kickback Act⁴⁸ for the first time in twenty-five years.⁴⁹ Sections 3.502-2, 9.406-1, and 52.203-7 of the FAR implemented these amendments, effective 6 February 1987.⁵⁰ Both contractors and subcontractors must provide written notice of potential violations to the government whenever they have reasonable grounds to believe that a violation may have occurred. Additionally, prime contractors (but not subcontractors) must adopt and implement reasonable procedures designed to detect and prevent violations, and must cooperate fully with government investigations of possible violations.

Small Business Thresholds, Set Asides, and Size Standards

Federal Acquisition Circular 84-28, 9 June 1987, implemented several changes to the FAR affecting small businesses. As required by section 922 of the FY 1987 DOD Authorization Act:⁵¹ the threshold for publicizing proposed acquisitions (other than sole source) was raised from \$10,000 to \$25,000; notices of solicitations between \$10,000 and \$25,000 must be posted; and the limitation for small business set asides was raised from \$10,000 to \$25,000. Also, new small business size standards tables were incorporated into the FAR, following the Office of Management and Budget's revised Standard Industrial Classification System.

Suspension and Debarment

Federal Acquisition Circular 84-25, 1 July 1987, revised FAR § 9.405 to exclude contractors and individuals suspended or debarred from acting as agents or representatives of other contractors.

DOD's New Profit Policy

In May 1986, the Secretary of Defense approved a Defense Financial Investment Review plan to reform the way DOD contracting officers establish pre-negotiation profit objectives on negotiated contracts. Interim regulations that adjusted the weighted guidelines method for determining profit objectives were adopted in October 1986. The final

⁴³ Pub. L. No. 99-661, § 931, 100 Stat. 3816, 3936 (1987) (codified at 10 U.S.C.A. §§ 2397b, 2397c (West Supp. 1987)).

⁴⁴ See DFARS §§ 3.170-1 to -5.

⁴⁵ DFARS § 52.203-7002.

⁴⁶ Pub. L. No. 99-661, § 908, 100 Stat. 3816, 3918 (1986).

⁴⁷ Pub. L. No. 99-591, § 9105, 100 Stat. 3341-118 (1987).

⁴⁸ 41 U.S.C.A. §§ 51-54 (West Supp. 1987).

⁴⁹ Pub. L. No. 99-634, 100 Stat. 3523 (1986).

⁵⁰ FAC 84-24, 6 Feb. 1987.

⁵¹ Pub. L. No. 99-661, § 922, 100 Stat. 3816, 3930 (1986).

rules on DOD's new profit policy came out in DAC 86-5, 1 Aug. 1987.⁵² The new weighted guidelines formula uses the same four factors that were in the interim rules (performance risk, contract type risk, facilities capital investment, and working capital adjustment), except that contract type risk has been decreased in weight so that more emphasis could be placed on facilities capital investment and working capital adjustment. Also, the contracting officer's discretion in applying the weighted guidelines has been increased by broadening the ranges of profit rates that can be applied to each factor. Additionally, the final regulations adopted an alternative formula for performance risk for R&D and service contracts, where there is lower capital investment in facilities and equipment compared to the defense industry overall.

Standards of Conduct—Revision of Army Regulation 600-50

General. Army Regulation 600-50⁵³ has been revised to include guidance from revised DOD Directive 5500.7, Standards of Conduct (May 6, 1987). It includes new prohibitions and guidance designed to avoid frequently-recurring delicate situations. It also provides guidance concerning employment restrictions and reporting requirements concerning former DOD personnel.

New Prohibitions. Paragraph 2-1e of the regulation now includes a prohibition against the use of inside information even after termination of government employment, and paragraph 2-1g adds a prohibition against the release of advance acquisition information in briefings to former Department of the Army (DA) or DOD personnel.

New Guidance. Paragraph 2-2a(2)(m) now allows DA employees to accept food and refreshments of nominal value if offered during the course of a working meeting. Paragraph 2-2c(9) has been added to permit commanders to approve attendance at vehicle rollouts and similar ceremonies as long as the function is not "lavish, excessive, or extravagant." Also, gifts or mementos presented to participants may be retained if valued at less than \$100.

Employment Restrictions. Paragraph 5-3c implements 10 U.S.C.A. § 2397(b) (West Supp. 1987), by placing a two-year employment restriction on certain former DOD officers and employees who either worked at a contractor's site or worked on a major defense system during a majority of their working days in the last two years with the government. The two-year restriction also applies to general officers and SES civilians who are involved in the negotiation of a contract or claim over \$10,000,000.

Reporting Defense Related Employment. A new paragraph 5-8 provides explicit guidance on the requirement of former officers and employees to report defense-related employment.

Reporting of Violations. Paragraph 2-10b of the regulation requires all violations involving procurement activities to be reported to the Procurement Fraud Division, Office of The Judge Advocate General.

Program Fraud Civil Remedies Act Proposed Regulations

Last year, we reported on the Program Fraud Civil Remedies Act of 1986,⁵⁴ noting that the statute provides authority for agencies to assess civil penalties for false claims and false statements in support of false claims. Jurisdiction is limited to a claim (or related claims) not exceeding \$150,000. In response to this new authority, DOD has issued proposed rules to implement the Act. The proposed rules provide that the Investigating Official (the DOD Inspector General) investigates and determines if there is adequate evidence of a false claim. If so, the case is forwarded to the Reviewing Official of the component (Army, Navy, Air Force, Defense Logistics Agency, or National Security Agency) who must be in grade O-7 or GS-16 or higher. Upon concurring that there is "adequate evidence," the Reviewing Official conveys to the Department of Justice the intention to refer the case to a Presiding Official. After receiving the approval of the Attorney General, the Reviewing Official initiates administrative proceedings against the defendant (false claimant). If the defendant requests a hearing, the Presiding Official (an Administrative Law Judge or functional equivalent) determines liability based on a preponderance of the evidence standard, and determines damages and assesses civil fines. There is an appeal to the Authority Head (of the component) and possible limited review in U.S. district court. The proposed regulations also set out a full range of due process rights available to parties participating in proceedings brought under this authority.⁵⁵ There has been no word yet on when these proposed regulations will be implemented. The GSA and the Agency for International Development have already issued final rules implementing the Act.⁵⁶

Protests

The Comptroller General

Protest Authority Challenge Taken to Supreme Court

The constitutionality of the provision in the Competition in Contracting Act (CICA) of 1984,⁵⁷ regarding stays of contract awards pending protests, is still under litigation. As we reported last year, the Court of Appeals for the Third Circuit held the provision constitutional in *Ameron, Inc. v. U.S. Army Corps of Engineers*.⁵⁸ After a request for rehearing by the Department of Justice, the Third Circuit affirmed its earlier decision. The court had granted the rehearing to consider whether the decision in *Bowsher v.*

⁵² See 52 Fed. Reg. 28,705 (1987).

⁵³ Dep't of Army, Reg. No. 600-50, Personnel—General—Standards of Conduct for Department of the Army Personnel.

⁵⁴ Pub. L. No. 99-509, 100 Stat. 1934 (1986) (codified at 31 U.S.C.A. §§ 3801-3812) (West Supp. 1987).

⁵⁵ 52 Fed. Reg. 26,692 and 26,693 (1987).

⁵⁶ Fed. Cont. Rep. (BNA) No. 48, at 824 (Nov. 30, 1987).

⁵⁷ Pub. L. No. 98-369, 98 Stat. 1200 (1986) (codified at 31 U.S.C.A. § 3553 (West Supp. 1987)).

⁵⁸ 787 F.2d 875 (3d Cir. 1986).

Synar⁵⁹ should alter its decision that the Comptroller General was not an agent of Congress and that it was permissible to delegate to him the power to order a stay of contract award pending his decision on a protest. In affirming its earlier decision, the court stated that CICA effectuated the proper balance of power between the executive and legislative branches and that the action by the Comptroller General provided meaningful oversight while leaving final control over procurement decisions to the executive.⁶⁰ The Department of Justice has filed a petition with the United States Supreme Court asking that the Court strike down the stay provision.⁶¹

New Protest Rules Promulgated

General. In March 1987, GAO proposed several modifications to its bid protest rules.⁶² In large measure, the proposed modifications were designed to make the GAO a more attractive forum for protesters. The proposed rules included enhanced discovery, a potential hearing on the merits, and a more liberal policy concerning protest costs and attorneys fees. The final rules were promulgated on 8 December 1987, and will apply to all protests filed on or after 15 January 1988.⁶³

Interested Parties. Section 21.0 is amended to add a provision defining an "interested party" for the purposes of intervention or participation in a post bid opening protest filed by another party. Where an award has been made, only the awardee will be deemed to be an interested party. Where no award has been made, participation will be limited to "bidders or offerors who appear to have a substantial prospect of receiving an award if the protest is denied."

Dismissal for Failure to Provide Copy of Protest to Contracting Officer. Section 21.1 requires the protester to furnish a copy of the protest to the contracting officer no later than one day after filing it with the GAO. Ostensibly, a protest may be dismissed for failure to comply with this rule. As a matter of practice, however, the GAO will dismiss a protest only where the government can show prejudice resulting from the lack of notice.⁶⁴ This rule is amended to codify GAO's approach to the notice requirement.

Discovery. Section 21.3 is amended to permit protesters to request specific documents. The request for documents must be submitted concurrently with the protest. Subsequent additional requests may be made for documents that first come to the attention of the protester in the administrative report.

Documents requested with the protest must be provided to the protester and other interested parties with the administrative report. Documents requested as a result of the

administrative report must be surrendered to the GAO within five working days.

Discovery is limited to documents that are relevant to protest issues and are otherwise releasable under the Freedom of Information Act. If the contracting agency believes that a document is not discoverable, the document and a statement of the agency's reason(s) for not releasing it to the protester must be forwarded to the GAO. GAO will act as the arbiter of disputes over releasability.

Fact Finding Conferences. A new Section 21.5 has been added to provide for a more formal conference to resolve factual disputes. As the rule was originally proposed, fact finding conferences would have been considered exceptional and granted sparingly. The final rule provides that such conferences may be held at the sole discretion of GAO "in order to resolve a specific factual dispute essential to the resolution of the protest which cannot be otherwise resolved on the written record." While the final rule provides more specific criteria for conferences, it offers few clues concerning how frequently conferences will be granted. In the discussion of agency comments, however, GAO noted that not every factual dispute will require a conference.⁶⁵

Section 21.5 states that fact finding conferences will be as informal as is reasonable and appropriate under the circumstances. Evidence will be admitted in the discretion of the presiding GAO official. The Federal Rules of Evidence will serve as guidance, but will not control admissibility. Witnesses will testify under oath and will be subject to examination by all parties. A transcript will be made of each proceeding.

Attorney's Fees and Bid Preparation Costs. GAO has eliminated the criteria that applied to awarding attorney's fees and bid preparation costs.⁶⁶ Under the old rules, attorney's fees were awarded whenever GAO determined that the protester had been unreasonably excluded from the competition. Bid preparation costs were awarded only when there was no other appropriate remedy.

The elimination of these criteria will result in many more awards of attorney's fees. GAO has stated that it believes "the costs of filing and pursuing a protest generally should be granted whenever a protest is sustained based on more than some technical violation of statute or regulation."⁶⁷

Although the criteria pertaining to bid preparation costs have been eliminated, there is no apparent reason to expect any change in policy with regard to the award of these costs.

⁵⁹ 106 S. Ct. 3181 (1986).

⁶⁰ *Ameron, Inc. v. U.S. Army Corps of Engineers*, 809 F.2d 979 (3rd Cir. 1986).

⁶¹ Fed. Cont. Rep. (BNA) No. 48, at 487 (Oct. 5, 1987).

⁶² See 4 C.F.R. pt. 21 (1986).

⁶³ 52 Fed. Reg. 46,445 (1987).

⁶⁴ *Menasco, Inc., Comp. Gen. Dec. B-223970* (22 Dec. 1986), 86-2 CPD ¶ 696.

⁶⁵ 52 Fed. Reg. 46,445 and 46,447 (1987).

⁶⁶ 52 Fed. Reg. 46,445 and 46,448 (1987).

⁶⁷ *Id.*

Some Noteworthy Decisions

GAO Jurisdiction—NAFI Acquisitions. The General Accounting Office ruled that an acquisition by the Department of Treasury, Office of the Comptroller of Currency (OCC), was subject to its bid protest jurisdiction, even though the "OCC appears to be a nonappropriated funds activity pursuant to 12 U.S.C. § 481" and used nonappropriated funds in the acquisition. In issuing the ruling, GAO recognized that its Bid Protest Regulations⁶⁸ state that procurements by NAFls are beyond its protest jurisdiction. Executive agencies are subject to the substantive portions of the Competition in Contracting Act, including GAO's bid protest jurisdiction, however. Because the OCC is a federal executive agency created by Congress, the GAO determined that the term "nonappropriated fund activity" as used in its protest regulations does not include the OCC.⁶⁹

Suspension Of Performance Triggered by GAO Notice Within Ten Days Of Award. In *McDonald Welding v. Webb*,⁷⁰ the Sixth Circuit held that the statutory requirement to suspend performance of a contract is triggered only by notice of protest from the GAO. See also *Information Resources, Inc. v. United States*,⁷¹ where the government received a copy of the protest from the protester within ten days after award, but did not receive the notice of protest from the GAO until the ten-day period had expired. The court held that it is the notice of protest from the GAO that requires the contracting officer to suspend performance, not actual notice.⁷²

Snow Days Are Working Days Too. In *Booz-Allen and Hamilton, Inc.*,⁷³ the protester argued that its ten-day time limit for filing a protest should be extended by one day because a snow storm closed the GAO for one day during its filing period. The GAO decided that "working day" means a working day of the federal government as a whole, and the isolated closing of federal offices in the Washington, D.C., area did not result in a nonworking day for the purposes of bid protest timeliness. GAO noted, however, that the time limit would be extended in instances where unusual closings occurred on the last day of a protester's filing period.

The General Services Board of Contract Appeals

Jurisdiction

In last year's report, we noted that Congress had amended the Brooks Act⁷⁴ to expand the definition of products and services falling under the exclusive procurement authority of the General Services Administration.

More significantly, the amendments also gave the General Services Board of Contract Appeals (GSBCA) authority to determine its own jurisdiction in automated data processing (ADP) bid protests. The GSBCA has continued its aggressive expansion of jurisdiction under this new statutory authority.

Warner Amendment Acquisitions. Section 2315 of 10 U.S.C. provides that certain DOD acquisitions are exempt from the requirements of the Brooks Act, including ADP that is an integral part of a weapons system or is critical to the direct fulfillment of military or intelligence missions. In *Julie Research Laboratories, Inc.*,⁷⁵ the GSBCA confirmed its authority to determine the applicability of the Brooks Act to acquisitions that DOD asserts are exempt under the Warner Amendment. In an earlier case involving the same issue, the board indicated that the Warner Amendment would be very narrowly construed.⁷⁶

In one of its most recent decisions, the board found that it did not have jurisdiction over a procurement to upgrade a computer system used in support of three aircraft and two cruise missile weapons systems.⁷⁷ The government argued that the system was exempted from the board's jurisdiction by the Warner Amendment because the system was an integral part of a weapons system, and the system was critical to the direct fulfillment of military missions. The board specifically rejected the "integral part of a weapons system" argument and determined that DFARS § 70.400(d) did not "adequately reflect the statute which it purports to implement." (The DFARS provision in question provides that automated data processing equipment (ADPE) used in training, testing, maintenance, and so on of a weapons system is an integral part of a weapons system.) The board, however, agreed that the system was critical to the direct fulfillment of military missions because the government showed a direct and necessary relationship of the hardware system to the software used in the aircraft and cruise missiles.

Nonappropriated Fund ADPE Acquisitions. Recently, the GSBCA sustained the protests of three unsuccessful offerors even though the acquisition in dispute was conducted using nonappropriated funds.⁷⁸ In the cases, the Department of Treasury, Office of the Comptroller of the Currency (OCC), awarded ADPE contracts without obtaining delegations of procurement authority from the GSA. The protestors argued that the OCC failed to comply with the Brooks Act⁷⁹ and the Competition In Contracting

⁶⁸ 4 C.F.R. pt. 21.3(f)(8) (1986).

⁶⁹ Comp. Gen. Dec. B-225959 (6 Feb. 1987).

⁷⁰ 829 F.2d 593 (6th Cir. 1987).

⁷¹ No. 87-2203 SSH (D.D.C. Sept. 3, 1987).

⁷² See *The Government Contractor*, Dec. 7, 1987, at 1.

⁷³ Comp. Gen. Dec. B-225770.2 (1 May 87), 87-1 CPD ¶ 460.

⁷⁴ 40 U.S.C.A. § 759 (West Supp. 1986).

⁷⁵ GSBCA No. 8919-P, 87-2 B.C.A. (CCH) ¶ 19,919.

⁷⁶ *Julie Research Laboratories, Inc.*, GSBCA No. 8070-P, 85-3 B.C.A. (CCH) ¶ 18,295.

⁷⁷ *Pacificorp Capital, Inc.*, GSBCA No. 9231-P, 87-3 B.C.A. (CCH) ¶ ___, noted in Fed. Cont. Rep. (BNA) No. 48, at 862 (Dec. 7, 1987).

⁷⁸ *Rocky Mountain Trading Co.*, GSBCA No. 8958-P, 87-2 B.C.A. (CCH) ¶ 19,840.

⁷⁹ Pub. L. No. 89-306, 79 Stat. 1127 (1965) (codified as amended at 40 U.S.C. § 759 (Supp. III 1985)).

Act.⁸⁰ The protestors further argued that the OCC did not comply with the Federal Information Resources Management Regulations (FIRM) and the Federal Acquisition Regulation when it conducted the procurements. The OCC unsuccessfully maintained that it was exempt from the Brooks Act requirements because, under the National Bank Act,⁸¹ it was not a "federal agency" subject to the acquisition authority restrictions. Instead, the OCC stated that it operated under "independent statutory procurement authority" conferred by 12 U.S.C. § 13 (1982).

In a decision that probably presages assertion of jurisdiction over DOD nonappropriated fund acquisitions, the GSBICA held that the OCC is a federal agency, and is therefore subject to the CICA, the Brooks Act, the FIRM, and the FAR. The CICA conferred jurisdiction upon the GSBICA to determine whether an ADPE acquisition is subject to the Brooks Act.⁸² Congress later made this jurisdiction, which had been a three-year test program, permanent in section 831 of the Omnibus Appropriations Act, 1987.⁸³ The Brooks Act grants to the GSA sole authority over ADPE acquisitions by "federal agencies" not otherwise exempted from the law. The OCC is not expressly exempted from the requirements of the Brooks Act. The board therefore ruled that its jurisdictional authority extended to OCC ADPE acquisitions because: the OCC is a federal agency not expressly exempted from the Brooks Act and the CICA; and its jurisdiction over ADPE acquisitions includes acquisitions funded with nonappropriated funds.

Contractor Acquired Equipment. An acquisition is subject to the Brooks Act if it requires a product or service that is produced or performed making significant use of ADP resources. Conversely, ADP resources acquired by a contractor that are incidental to the performance of a contract are not subject to the Brooks Act.⁸⁴ In *Wildhack & Associates, Inc.*,⁸⁵ the board concluded that if ADP resources are explicitly required under a contract, they are not incidental, and an explicit requirement for ADP resources results in a significant use. As an example of truly incidental equipment, the board offered the purchase of personal computers by a construction contractor to help monitor material, equipment, and personnel on large projects.

Reprocurements. The board decided that it has jurisdiction to hear a protest involving a reprocurement following a default termination.⁸⁶ Although the statutory requirement for full and open competition does not apply to a reprocurement, the board determined that it could review contracting officer actions for compliance with the FAR

§ 49.402-6 requirement for maximum practicable competition. This decision is consistent with GAO opinions on the issue.⁸⁷

Non-ADP issues. Although the board's jurisdiction is limited to procurements involving ADP resources, the grounds for the protest do not have to be related to ADP, the Brooks Act, or the Federal Information Resources Management Regulation. In *Vanguard Technologies Corp.*,⁸⁸ the board heard a protest that the Veteran's Administration violated FAR deviation requirements by not getting approval of a clause that provided for cancellation of an OMB Circular A-76 solicitation if only one offer was received.

ADP Acquisitions. An acquisition does not have to be exclusively, or even predominantly, for ADP resources to provide a basis for GSBICA jurisdiction. In *Julie Research Laboratories, Inc.*,⁸⁹ the government was acquiring 236 workstations. Seventy of the stations included an item classifiable as ADP. The item accounted for only twenty percent of the cost of these seventy stations. In finding a basis for jurisdiction, the board noted that its jurisdiction is not dependent upon the relative significance of the cost of ADP included in an acquisition. Based upon this decision, and the *Wildhack* case noted above, it appears safe to conclude that the board would find jurisdiction wherever an ADP item is an identifiable requirement in a solicitation.

Attorney's Fees & Costs

Fees and Costs Awarded for Appeal. The board has been very liberal in awarding attorney's fees and protest costs. In *The Thorson Co.*,⁹⁰ it awarded fees for not only the protest, but also for a subsequent appeal to the Court of Appeals for the Federal Circuit. In the same case, the board rejected the government's argument that Equal Access to Justice Act standards should apply to the award of attorney's fees in bid protests. The board stated that the criterion for determining the award of fees is not whether the government's position was "substantially justified," but whether the protester has "succeeded on any significant issue . . . which achieves some of the benefit . . . sought in bringing suit."⁹¹

Argument for Pro Rata Fees Rejected. In the application of the above standard, the board has ruled that the protester need not prevail on every issue to be entitled to attorney's fees. The government had urged the board to view every issue as a distinct claim, and to award fees only for issues on which the protester prevailed. The board rejected this pro rata recovery theory and decided that prevailing on a significant issue is a sufficient basis for the

⁸⁰ Pub. L. No. 98-369, 98 Stat. 1175 (1984).

⁸¹ 12 U.S.C. § 481 (1982).

⁸² Pub. L. No. 98-369, 98 Stat. 1184 (1985) (codified at 40 U.S.C.A. § 759(h)(1) (West Supp. 1987)).

⁸³ Pub. L. No. 99-591, § 831, 100 Stat. 3341, 3344 (1986).

⁸⁴ See the definition of automated data processing equipment in 40 U.S.C.A. § 759a (West Supp. 1987).

⁸⁵ GSBICA No. 9108-P, 87-3 B.C.A. (CCH) ¶ 20,092.

⁸⁶ SMS Data Products Group, Inc., GSBICA No. 8912-P, 87-2 B.C.A. (CCH) ¶ 19,812.

⁸⁷ See, e.g., VCA Corp., Comp. Gen. Dec. B-219305.2 (19 Sept. 1985), 85-2 CPD ¶ 308; A.J. Fowler Corp., Comp. Gen. Dec. B-224156 (9 Jan. 1987), 87-1 CPD ¶ 33.

⁸⁸ GSBICA No. 8885-P, 87-2 B.C.A. (CCH) ¶ 19,814.

⁸⁹ GSBICA No. 8919-P, 87-2 B.C.A. (CCH) ¶ 19,919.

⁹⁰ GSBICA No. 8820-C (8185-P), 87-1 B.C.A. (CCH) ¶ 19,633.

⁹¹ *Id.* at 99,386.

award of attorney's fees and costs. The board has declined to award costs and fees associated with an issue that is dismissed for lack of a valid legal basis, however.⁹²

Suspensions of Procurement Authority

Several decisions have addressed the issue of urgent and compelling circumstances required to avoid a suspension of procurement authority where a protest is filed prior to award or within ten days after award. Urgent and compelling circumstances are shown by proving a serious and critical impairment of an agency's mission that cannot be overcome by any alternative other than the protested contract.

Urgent and Compelling Circumstances. A statutorily imposed deadline was an adequate basis for denying a suspension.⁹³

Not So Urgent and Compelling. Substantially increased costs were not sufficient to avoid suspension.⁹⁴ Interestingly, the increased costs in this case were \$450,000, or three times the value of the procurement. The board was also not persuaded by a potential loss of current year funding and inability to fund the requirement in the following year.⁹⁵

No Alternatives Available. The ability to make up lost time through extra effort and compressed scheduling defeated the Bureau of Census's bid to avoid a suspension. In this case, the Bureau's schedule was geared towards "census day" on April 1, 1990.⁹⁶

Other Noteworthy GSBGA Decisions

Fragmenting Requirements. Requiring activities (and sometimes contracting offices) will sometimes break a system into components or subsystems to avoid Commerce Business Daily synopsis requirements or to stay within the blanket delegations of authority granted in part 201-23 of the Federal Information Resource Management Regulations. This latter "acquisition strategy," however, is prohibited by FIRMR § 201-23.103(a)(2). The board joined the GAO in prohibiting the former in *Digital Services Group, Inc.*⁹⁷ This decision is helpful reading for the attorney faced with the problem of defining an "ADP requirement."

Discovery Limitations. In *Federal Sources, Inc.*,⁹⁸ the board ruled that the government had properly withheld an awardee's unit prices.

Late Bids. What happens when the time for submission of proposals is listed as "close of business" on a specified date? FAR § 15.412(b) provides that 4:30 p.m. local time is the deadline when the solicitation does not include a specific time for submission. Thus, in *Federal Systems Group, Inc.*,⁹⁹ the government argued that the protester's 4:38 p.m. submission was untimely. The board, however, determined that "close of business" was a specified time and that offers should be accepted as long as employees were present for their normal duty hours.¹⁰⁰

What happens when a proposal closing date is extended to another specified date, but no specified time is included in the amendment? GAO decisions hold that the time for submission of proposals remains the same as that provided in the solicitation before amendment.¹⁰¹ The board, however, departed from this GAO precedent by treating the solicitation as having no specified time and finding that FAR § 15.412(b) operates to establish 4:30 p.m. as the deadline for receipt of proposals.¹⁰²

The Courts

Fifth Lowest Bidder Has Standing

In *Solon Automated Services, Inc. v. United States*,¹⁰³ the district court determined that the fifth lowest bidder had standing to protest an award made on the basis of an alleged materially unbalanced offer. Relying on the Claims Court's "substantial chance of award" test,¹⁰⁴ the government argued that an unsuccessful bidder has standing to challenge award only if it is the next lowest bidder. The court rejected this argument, noting that the D.C. Circuit had not adopted the Claims Court test, and that the requirements of standing were satisfied by showing a nexus between the government's action and plaintiff's injuries, and showing that the injury is redressable. In this case, the court found that award made on the basis of a materially unbalanced offer tainted the entire procurement process and ordered resolicitation of the contract.

Override Determination is Subject to Judicial Review

In *Universal Shipping Company v. United States*,¹⁰⁵ the district court determined that the decision to override the automatic stay resulting from a GAO protest is subject to judicial review. The government unsuccessfully argued that this decision was committed to agency discretion by law and therefore was not reviewable under 5 U.S.C. § 701(a)(2).

⁹² Computervision Corp., GSBGA No. 8686-P, 87-2 B.C.A. (CCH) ¶ 19,944.

⁹³ Tab, Inc., GSBGA No. 8679-P, 87-1 B.C.A. (CCH) ¶ 19,495.

⁹⁴ I-Net, Inc., GSBGA No. 9155-P, 87-3 B.C.A. (CCH) ¶ 20,096.

⁹⁵ Computer Sciences Corp., GSBGA No. 9127-P, 87-3 B.C.A. (CCH) ¶ 20,095.

⁹⁶ Prime Computer, Inc., GSBGA No. 9000-P, 87-2 B.C.A. (CCH) ¶ 19,918.

⁹⁷ GSBGA No. 8735-P, 87-1 B.C.A. (CCH) ¶ 19,555.

⁹⁸ GSBGA No. 9082-P, 87-3 B.C.A. (CCH) ¶ 20,200.

⁹⁹ GSBGA No. 9240-P, 87-3 B.C.A. (CCH) ¶ ____; Fed. Cont. Rep. (BNA) No. 48, at 919 (Dec. 14, 1987).

¹⁰⁰ Fed. Cont. Rep. (BNA) No. 48, at 919 (Dec. 14, 1987).

¹⁰¹ Sandler-Innocenzi, Comp. Gen. Dec. B-218322 (26 Mar. 1985), 85-1 CPD ¶ 353.

¹⁰² B.H. & Associates, GSBGA No. 9209-P, 87-3 B.C.A. (CCH) ¶ ____ (2 Dec. 1987); Fed. Cont. Rep. (BNA) No. 48, at 959 (Dec. 21, 1987).

¹⁰³ 658 F. Supp. 28 (D.D.C. 1987).

¹⁰⁴ See *Caddell Constr. Co. v. United States*, 9 Cl. Ct. 610 (1986).

¹⁰⁵ 652 F. Supp. 668 (D.D.C. 1987).

In *A & C Bldg. & Indus. Maintenance Corp. v. United States*,¹⁰⁶ the incumbent contractor was left off the mailing list for an amendment announcing a previously suspended bid opening date. The contractor's suit was timely filed in the Claims Court, but was dismissed for lack of standing. The court noted that its pre-award jurisdiction is based upon the implied-in-fact contract that arises from the submission of a bid. The implied-in-fact contract arises from the promise to consider the bid fairly and honestly in exchange for its submission. Notwithstanding the government's evident violations of CICA and the FAR, the court determined that the contractor's failure to submit a bid left the court without jurisdiction to grant relief.

Litigation

Jurisdiction

Deemed Denial

Section 6(c)(5) of the Contract Disputes Act (CDA) provides that "any failure by the contracting officer to issue a decision on a contract claim within the period required will be deemed to be a decision by the contracting officer denying the claim and will authorize the commencement of the appeal or suit on the claim."¹⁰⁷ This "deemed denial" provision sparked the issue of whether the ninety-day or twelve-month statute of limitations period for appealing adverse contracting officer final decisions begins to run when the contracting officer fails to render a final decision within the period required. Last year, we reported that the Claims Court decided that the statute of limitations period for appealing final decisions to that court *did* begin to run upon a "deemed denial" of a claim.¹⁰⁸ The CDA, however, requires that a written decision stating the reasons therefore be issued by the contracting officer, that the decision be mailed or otherwise delivered to the contractor, and that the decision inform the contractor of its appeal rights. Not surprisingly, then, the Court of Appeals for the Federal Circuit reversed,¹⁰⁹ stating that a final decision by a contracting officer conforming to the requirements of the CDA, and received by the contractor, is required to trigger the limitations period. The court compared the deemed denial situation to a defective final decision, and emphasized that the key factual similarity between the two situations was that neither gives the contractor adequate notice of its appeal rights. Therefore, neither a deemed denial nor a defective final decision will trigger the limitations period for appeal.

¹⁰⁶ 11 Cl. Ct. 385 (1986).

¹⁰⁷ Pub. L. No. 95-563, 92 Stat. 2385 (codified at 41 U.S.C.A. § 605(c)(5) (West Supp. (1987)) (emphasis added).

¹⁰⁸ *Pathman Constr. Co. v. United States*, 10 Cl. Ct. 142 (1986).

¹⁰⁹ *Pathman Constr. Co. v. United States*, 817 F.2d 1573 (Fed. Cir. 1987).

¹¹⁰ 12 Cl. Ct. 507 (1987).

¹¹¹ 41 U.S.C. § 605(c)(4)(1982).

¹¹² *Blake Constr. Co., Inc. v. United States*, 13 Cl. Ct. 250 (1987).

¹¹³ 8 Cl. Ct. 531 (1985).

¹¹⁴ 6 Cl. Ct. 298 (1984).

A decision of interest because it comes on the heels of the *Pathman* case is *W&J Construction Corp. v. United States*.¹¹⁰ The contractor sent two letters to the NASA Board of Contract Appeals stating that it intended to appeal the contracting officer's failure either to issue a final decision on its certified claim or to notify it when a decision would be forthcoming. Shortly thereafter, the contracting officer issued a final decision denying the claim, which advised the contractor of its right to appeal to the board or the Claims Court. The contractor went directly to the court. Before the court, the government argued that the contractor's letters to the board were a binding election of forum and thus barred the contractor from proceeding in the court. The court held that the contractor's letters were merely a request to the board, under the Contract Disputes Act,¹¹¹ to direct the issuance of a final decision. Thus the letters were not a binding election of forum under section 605(c)(5) of the CDA, which permits a contractor to commence an appeal on the deemed denial of a claim caused by the contracting officer's failure to issue a decision. The contractor was not bound to appeal to the board just because it asked the board to order a final decision. Such an interpretation would mean that every request to a board to direct a final decision would be a binding election, a result not intended in the CDA.

In an interesting twist to the binding election issue, the Claims Court held that a contractor who mailed a notice of appeal to the Armed Services Board of Contract Appeals (ASBCA), but retrieved it before filing, did not make a binding election of forum.¹¹² The court held that mailing is not a filing in every instance. While acknowledging that under ASBCA rules, the mailing date serves as the filing date for documents, the court refused to bind a contractor to that forum where the contractor actively asserts that it does not wish to exercise the board's jurisdiction. The issue of retrieval seemed to be persuasive to the court and the government was unable to address it.

Nonmonetary Claims

An issue dividing the Claims Court and the boards is that of jurisdiction over nonmonetary claims. The issue most frequently arises where the contractor has been terminated for default and has not made a termination for convenience claim, or where excess costs have not been assessed against the contractor. In *Gunn-Williams v. United States*,¹¹³ the Claims Court held that a default termination is not a final decision, while in *Z.A.N. Co. v. United States*,¹¹⁴ it held that it is. Although this conflict of authority was not resolved this year, two additional Claims Court decisions, rendered by the same judge, fall into the *Gunn-*

*Williams camp: Citizens Associates, Ltd. v. United States*¹¹⁵ and *Swager Tower Corp. v. United States*.¹¹⁶ In *Citizens Associates*, the court held that a contractor's challenge to a default termination will not invoke the court's jurisdiction until either: it files a monetary claim with the government, or the government asserts a claim against the contractor. In this case, the contractor had been partially terminated for default on a lease for office space.

In another case, the Claims Court took jurisdiction over a default termination and the government's attempts to recover unliquidated progress payments.¹¹⁷ The government had argued that, because no certified claim had been presented to the contracting officer, the contractor's appeal from the default termination and challenge to the demands for the return of progress payments constituted declaratory judgment actions because they were not redressable in monetary terms. While conceding that the court had not spoken consistently on the issue of nonmonetary claims, the court nonetheless denied the government's motion to dismiss. The court found that the government's claim seeking repayment of money was sufficient to provide a monetary foundation such that the court did not run afoul of the prohibition against rendering declaratory judgments. And, in order to determine whether the contractor was liable for return of the progress payments, it was necessary to review the default termination.

This leaves the ASBCA,¹¹⁸ the other agency boards of contract appeals, and some of the Claims Court judges treating default terminations as final decisions, with a following of *Gunn-Williams* in the Claims Court slowly growing. Two recent cases from the Department of Transportation Board of Contract Appeals review the history of jurisdiction at the boards and the Claims Court in these types of cases, and conclude that boards have jurisdiction to hear all claims arising out of a contract.¹¹⁹ In *Lisbon Contractors, Inc. v. United States*,¹²⁰ the Court of Appeals for the Federal Circuit acknowledged this split of authority, but gave no indication of its position.

Certification

The issue of certification continues to be litigated. In a case that recognized the conflicts that may be present between a prime contractor and its subcontractor, the Court of Appeals for the Federal Circuit held that certification of a subcontractor's claim using the statutory language is not invalid even where the prime contractor had previously recommended rejection of the same claim.¹²¹ The subcontractor had certified its claim to the prime who, under its contract with the government, was required to submit a report on the claim to the government. In accordance with this obligation, the prime evaluated the merits of

the claim and concluded that it should be rejected for seeking extra costs for work that was already included within the specified scope of work. The prime later certified the claim as required by the CDA. The court held that certification does not mean that the prime contractor believes the subcontractor's claim to be valid or certain, but only that there are good grounds for the claim. Where, however, the prime fails to certify that the claim is accurate and complete, the fact that the subcontractor has certified it as accurate and complete will not be considered, because this amounts to a qualified certification by the subcontractor who has no privity of contract with the government.¹²²

Even when contractors provide the necessary data, boards will dismiss appeals for failure to certify the claims as required by the CDA. In *Truesdale Construction Co., Inc.*,¹²³ the contractor submitted its claim to the contracting officer, who requested more specific identification of claimed delay costs. After the contractor did this, the contracting officer issued a final decision denying the claim. The contractor appealed to the ASBCA, which dismissed the case without prejudice on the government's motion to dismiss for lack of jurisdiction alleging failure to certify the claim, which was in excess of \$50,000. The ASBCA reiterated settled law that certification is a jurisdictional prerequisite to the initiation of an appeal.

In another aspect of the certification issue, the ASBCA dismissed a claim for lack of jurisdiction based on a defective certification and on the contractor's refusal to provide sufficient data with its claim to the contracting officer.¹²⁴ The contractor submitted its delay claim to the contracting officer, and then refused to provide requested supporting information with which the government could better evaluate the claim. When the contracting officer did not issue a final decision, Gauntt appealed to the board. Finding that Gauntt had provided so little information to the government that no meaningful decision could be made, the board said that the failure to issue a decision could not be considered a denial such as to vest the board with jurisdiction. Additionally, the board found that Gauntt's certification was defective by using the term "all data used" were accurate and complete, rather than the statutorily required "supporting data." Without a proper certification, there was no claim on which the contracting officer could issue a final decision or on which the board could assume jurisdiction.

One last case of some note regarding certification held that the dollar threshold for the certification requirement is measured by the amount claimed and not by the amount in

¹¹⁵ 12 Cl. Ct. 599 (1987).

¹¹⁶ 12 Cl. Ct. 499 (1987).

¹¹⁷ *Ralcon, Inc. v. United States*, 13 Cl. Ct. 294 (1987).

¹¹⁸ See, e.g., *Advanced Computer Techniques Corp.*, ASBCA No. 30128, 85-3 B.C.A. (CCH) ¶ 18,171.

¹¹⁹ *Michael M. Grinberg, DOT BCA No. 1543*, 87-1 B.C.A. (CCH) ¶ 19,573; *Varo, Inc., DOT BCA No. 1695*, 87-1 B.C.A. (CCH) ¶ 19,430.

¹²⁰ 828 F.2d 759 (Fed. Cir. 1987).

¹²¹ *United States v. Turner Constr. Co.*, 827 F.2d 1554 (Fed. Cir. 1987).

¹²² *Raymond Kaiser Engineers, Inc./Kaiser Steel Corp.*, a Joint Venture, ASBCA No. 34133, 87-3 B.C.A. (CCH) ¶ 20,140.

¹²³ ASBCA No. 33864, 87-3 B.C.A. (CCH) ¶ ____ (29 Sept. 1987).

¹²⁴ *Gauntt Constr. Co., Inc.*, ASBCA No. 33323, 87-3 B.C.A. (CCH) ¶ ____ (29 Sept. 1987).

dispute. The dispute in *Clark Mechanical Contractors*¹²⁵ was over additional work performed by the contractor at a cost of \$100,000, and a claim by the government of \$40,000 for defective work. The government had offered to pay the contractor \$60,000 for the additional work. The contractor alleged that it did not need to certify the claim because only \$40,000 was actually in dispute, and this was less than the \$50,000 threshold for certification under the CDA. The court ruled that the claim was comprised of the demand by the contractor for its costs of \$100,000. The fact that the government was willing to pay \$60,000 did not eliminate that amount from the total claim. Because the certification requirement is jurisdictional, the court was required to dismiss for lack of jurisdiction.

Fulford Doctrine

The *Fulford*¹²⁶ doctrine was the subject of some litigation this past year. In *Mactek Industries Corp.*,¹²⁷ the ASBCA held that the doctrine, which permits consideration of the propriety of an unappealed default termination in an appeal from an assessment of excess costs, was not applicable to an appeal concerning a government demand for the return of unliquidated progress payments. No appeal had been filed on an earlier termination for default. The contractor argued that the doctrine should be extended by analogy, but the board noted that the contractor was challenging the default itself, not the amount of payment demanded, and the progress payment clause in question did not contain an excusability provision.

Later in the year, the Agriculture Board of Contract Appeals, in *Ace Reforestation, Inc.*,¹²⁸ stated that it would no longer follow the *Fulford* doctrine in disputes involving the Forest Service's default clause. The board found that the difference between the default clause in the *Fulford* case and the Forest Service default clause was significant in that the Forest Service clause requires that excusability be considered before the contract is terminated. The board did not find the same ambiguity as was found in *Fulford*, where the default clause did not expressly condition the right to terminate on a finding that the default was not excusable and that such determination could be made after the termination. Therefore, because excusability had been considered, the contractor had only the ninety-day appeal period to seek review of the termination, which is jurisdictional under the CDA and cannot be waived.

What about the reverse of *Fulford*, where the issue of excess costs is combined with the timely appeal of default termination, even though the appeal of excess costs is untimely?¹²⁹ The Interior Board of Contract Appeals decided

that, as long as *Fulford* had survived the jurisdiction requirements of the CDA, there was no reason that the *El-Tronics* case should not also. The board therefore allowed a late appeal of an excess cost assessment to be combined with the timely default appeal.¹³⁰

ASBCA Jurisdiction Over NAF Contract Disputes

The Contract Disputes Act¹³¹ does not apply to nonexchange nonappropriated fund (NAF) contracts. Therefore, the jurisdiction of the ASBCA over these types of contracts is limited to those contracts containing a disputes clause granting the board jurisdiction, such as FAR § 52.233-1, Disputes (Apr. 1984), or "pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure."¹³²

The ASBCA ruled in *Recreational Enterprises*¹³³ that DOD Instruction 4105.67 requires all DOD NAF contracts to include a disputes clause granting a contractor a right of appeal of "all disputes." Accordingly, the board held that it had subject matter jurisdiction over appellant's breach of contract claim even though the contract between the NAF and appellant did not contain the required disputes clause. The government's motion to dismiss for lack of jurisdiction was therefore denied.

Equal Access to Justice Act

Background

As we reported last year, the Equal Access to Justice Act (EAJA)¹³⁴ has become a major source of litigation in government contracts. The EAJA allows an eligible prevailing litigant to recover attorney's fees and expenses where the government's position is not substantially justified. An application for fees must be submitted within thirty days of final judgment. The amount of fees is to be reasonable and based upon prevailing market rates. Fees will not be awarded in excess of \$75 per hour unless the court or board determines that an increase in the cost of living or a special factor justifies a higher fee. Some of the more interesting decisions under the EAJA follow.

Timeliness

The ASBCA found jurisdiction over a fee application in *Bristol Electronics Corp.*,¹³⁵ under the provision of the EAJA that provided jurisdiction in cases pending or commenced before a board after 1 October 1981, provided that the application for fees and other expenses was timely filed but was dismissed for lack of jurisdiction. The government

¹²⁵ 12 Cl. Ct. 415 (1987).

¹²⁶ ASBCA Nos. 2143, 2144, 6 C.C.F. (CCH) ¶ 61,815 (20 May 1955).

¹²⁷ ASBCA No. 33277, 87-1 B.C.A. (CCH) ¶ 19,345.

¹²⁸ AGBCA No. 84-272-1, 87-3 B.C.A. (CCH) ¶ ____ (14 Oct. 1987).

¹²⁹ See, e.g., *El-Tronics, Inc.*, ASBCA No. 5437, 61-1 B.C.A. (CCH) ¶ 2961.

¹³⁰ Tom Warr, IBCA No. 2360, 87-3 B.C.A. (CCH) ¶ ____ (14 Oct. 1987).

¹³¹ 41 U.S.C. § 602 (1982).

¹³² See *Commercial Offset Printers, Inc.*, ASBCA No. 25302, 81-1 B.C.A. (CCH) ¶ 14,900.

¹³³ ASBCA No. 32176, 87-1 B.C.A. (CCH) ¶ 19,675.

¹³⁴ 5 U.S.C.A. § 504 (West Supp. 1987) and 28 U.S.C.A. § 2412 (West Supp. 1987).

¹³⁵ ASBCA Nos. 24792, 24929, 25135-25150, 87-2 B.C.A. (CCH) ¶ 19,697.

contended that the contractor's filing with the contracting officer, who did not forward the application to the board, was insufficient as the board had not actually dismissed the application for lack of jurisdiction. The problem arose because of a presidential memorandum that directed agencies to accept and hold applications for fee awards pending congressional reauthorization of the EAJA. The board thus decided that the contractor's filing with the contracting officer was sufficient. Additionally, the board held that the failure to file an itemized statement of fees in the application was only a pleading requirement, and defects in pleading requirements are not jurisdictional.

Eligibility of a Party

The ASBCA looked at the eligibility of a party to recover fees under the EAJA in *Teton Construction Co.*¹³⁶ The board held that EAJA relief is not available where the subcontractor, the "real party in interest," meets the statute's net worth standards but the sponsoring prime contractor does not. The statute represents a waiver of sovereign immunity and must therefore be narrowly interpreted.

Substantial Justification

In *Yamas Construction Co.*,¹³⁷ the ASBCA considered the question of substantial justification of the position of the agency. A prevailing party otherwise eligible is entitled to recover fees and expenses under the EAJA unless the position of the agency was substantially justified. The standard is more than mere reasonableness and depends upon all pertinent facts. The board reviewed all of the contractor's claims, and found the government's positions in its responses thereto to be reasonable. The contractor had totally confusing theories for recovery, and had refused a reasonable settlement offer from the government. Additionally, an audit had shown that there were questions whether the contractor could show claimed labor costs. Therefore, the government acted reasonably in requiring the contractor to prove its claims at a hearing.

In *Henry Shirek*,¹³⁸ however, the ASBCA again looked at the substantial justification issue and found the government wanting. The board found that the contract as awarded was deficient and caused disputes shortly after performance began. Furthermore, the government insisted on pressing tenuous legal and factual defenses to the contractor's claims. Finally, the government's position in a subsequent motion for reconsideration was not justified. The case then went into a painstaking analysis of the amounts to be awarded. Amounts that were not adequately supported were reduced or eliminated.

Attorneys Fees as a Discovery Sanction

The ASBCA held that it had no jurisdiction to award a contractor fees under the EAJA as a sanction for the government's failure to comply with a discovery order.¹³⁹ The request for fees was premature because the EAJA only authorizes fees to prevailing parties in the proceeding involved, and not as a sanction. Similarly, a contractor is not entitled to fees just because the board orders the contracting officer to issue a final decision. This action is not really an appeal and is not an adversary adjudication.¹⁴⁰

Settlement Agreements

Finally, in *Peter Kraus Versorgungstechnik GmbH*,¹⁴¹ the board held that a settlement agreement on quantum, after the board had decided entitlement, that stated that the agreement constituted full and final payment on all matters under the contract, did not bar a contractor's application for fees under the EAJA. If the government wants settlements to bar fees applications, it may include such a provision in the agreement and indicate the consideration to the contractor for giving up the right to fees. The government's assertion that it was substantially justified in denying the contractor's claims was without merit because the government had not followed the procedures set out in the request for proposals for evaluation of offers. As for the contractor's request for attorney fees at the rate of \$125 per hour, the board held that the EAJA limits fees to \$75 per hour unless it is determined by regulation that higher fees are justified. No regulation so provided. The board also commented that in opposing an EAJA application, the government should, by affidavit, specify and take issue with any fees and expenses to which it objects.

A similar case is *PetroElec Construction Co., Inc.*¹⁴² In that case, a general release in a settlement agreement, in which the contractor had obtained a significant part of the relief it sought, did not bar it from asserting its rights under the EAJA.

General Dynamics DIVAD Litigation

Background

On 19 June 1987, the U.S. District Court for the Central District of California dismissed the criminal indictment against General Dynamics Corporation, and four executives, for charges arising from its Division Air Defense (DIVAD) contract.¹⁴³ General Dynamics had received a contract to develop prototypes for the DIVAD gun system, a computer-operated anti-aircraft system. The indictment had alleged that General Dynamics had conspired to shift approximately \$3.2 million in DIVAD development costs to its Independent Research and Development (IR&D) and Bid and Proposal (B&P) accounts for all federal contracts.

¹³⁶ ASBCA Nos. 27700 & 28968, 87-2 B.C.A. (CCH) ¶ 19,766.

¹³⁷ ASBCA No. 27366, 87-2 B.C.A. (CCH) ¶ 19,695.

¹³⁸ ASBCA No. 28414, 87-2 B.C.A. (CCH) ¶ 19,765.

¹³⁹ *Turbomach*, ASBCA No. 30799, 87-2 B.C.A. (CCH) ¶ 19,756.

¹⁴⁰ *Honeycomb Co. of America, Inc.*, ASBCA No. 33936-246R (28 Oct. 1987), cited in Fed. Cont. Rep. (BNA) No. 48, at 801 (Nov. 23, 1987).

¹⁴¹ ASBCA No. 27256, 87-2 B.C.A. (CCH) ¶ 19,880.

¹⁴² ASBCA Nos. 32999 et. al., 87-3 B.C.A. (CCH) ¶ 20,111.

¹⁴³ Fed. Cont. Rep. (BNA) No. 47, at 1155 (June 29, 1987).

The indictment was voluntarily dismissed by the government after it concluded that the contract was a fixed price (best efforts) contract, rather than a firm fixed price contract. Under the "best efforts" contract, General Dynamics was required to use only its best efforts to perform within the time and funding requirements of the contract. After exhausting the contract's fund limitations, General Dynamics was not required to perform further under the contract. IR&D and B&P costs which are not required by a specific contract may be charged to the contractor's general IR&D and B&P accounts. Accordingly, General Dynamics had properly charged the questioned costs to its general IR&D and B&P accounts.

ASBCA Decision

Prior to the dismissal of the indictment, General Dynamics had initiated an appeal to the Armed Services Board of Contract Appeals pursuant to a referral ordered by the district court under the doctrine of primary jurisdiction. The district court stayed the criminal proceedings pending the ASBCA's action on various questions. The ASBCA held that the doctrine of primary jurisdiction did not confer jurisdiction upon it. The doctrine of primary jurisdiction arises "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."¹⁴⁴ The district court judge had contended that the regulated nature of the defense industry, the expertise of the ASBCA, the need for uniformity, and the possible vagueness of the contract justified the referral to the ASBCA. But the doctrine applies only "when the administrative body has exclusive jurisdiction over the same matter which has become the subject of a court action."¹⁴⁵ The ASBCA stated that it does not have exclusive jurisdiction over disputes on DOD contracts, but instead shares it with the U.S. Claims Court. The board also held that it lacked jurisdiction because no final decision had been issued concerning the subject matter of the court action.

Ninth Circuit Decision

Meanwhile, the government had appealed the district court action, and the Court of Appeals for the Ninth Circuit held that the stay of the criminal action and referral to the ASBCA by the district court was improper.¹⁴⁶ The Ninth Circuit stated that the doctrine of primary jurisdiction did not apply to the referral because the ASBCA had no regulatory powers. The court noted that the doctrine of primary jurisdiction is primarily concerned with protecting an agency's quasi-legislative powers, not with providing expert advice to the courts. Because the ASBCA is not charged with the primary responsibility of regulating an industry or activity, the primary jurisdiction doctrine did not apply.

Background

In *Texas Instruments, Inc.*,¹⁴⁷ the ASBCA considered the application of the Truth in Negotiations Act¹⁴⁸ to computer-generated reports used by contractors to plot learning curves, ascertain trends, and estimate future costs. Computer-generated reports often contain both verifiable facts, which must be certified and disclosed to the government under the Act, and elements of judgment, which do not. The computer-generated report in issue was a "rolled up run cost" report. Texas Instruments used these reports to estimate unit costs. The rolled up run cost report in question concerned direct manufacturing labor, and contained a cost entry for each part and assembly, rolled up into the next higher assembly, until the total direct manufacturing cost for a final assembly or product for an equivalent or hypothetical system was obtained. The cost information contained in the rolled up run cost report consisted for the most part of data from detailed job order cost reports and product account summaries. The judgmental nature of the report involved the judgments exercised by Texas Instruments in selecting the appropriate cost data, its judgment as to the reliability of the data as future estimates, and the inclusion of "pure" estimates when no cost or pricing data was available. Although Texas Instruments disclosed the report to the Navy with its proposal, it did not update it during the negotiations.

ASBCA Decision

Rolled Up Run Cost Report. The ASBCA found that the report was

both a step in an estimating process and a method whereby [Texas Instruments] disclosed its cost or pricing data contained in the [detailed job order cost reports] and the project accounts in a meaningful manner so that [the Navy] would be clearly and fully informed of the significance of the underlying cost data to the negotiation process.

The ASBCA held that the rolled up run cost was cost or pricing data that Texas Instruments had a duty to disclose, notwithstanding that it was generated judgmentally and included judgments and estimates. The report included verifiable data from the detailed job order cost reports and project account summaries, reports that were not disputed to be certifiable cost or pricing data. The ASBCA did, however, state that only the cost or pricing data in the rolled up run cost report was required to be accurate, complete, and current. The ASBCA held that the report disclosed Texas Instruments' exercise of judgments and the facts represented by those judgments in a meaningful manner. But the ASBCA found no defective pricing because the report was accurate, complete, and current as to the cost or pricing data it disclosed. The report did not purport to include *all* the cost or pricing data existing up to the point of agreement on price. Texas Instruments furnished *other* cost or pricing

¹⁴⁴ General Dynamics Corp., ASBCA No. 33633, 87-1 B.C.A. (CCH) ¶ 19,607, at 99,202 (citing *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956)).

¹⁴⁵ *Id.* (citations omitted).

¹⁴⁶ *United States v. General Dynamics Corp.*, 828 F.2d 1356 (9th Cir. 1987).

¹⁴⁷ ASBCA No. 23678, 87-3 B.C.A. (CCH) ¶ 20,195.

¹⁴⁸ Pub. L. No. 99-661, 100 Stat. 3949 (1986).

data through detailed job order cost reports, project account summaries, and learning curve projections, which made Texas Instruments' total disclosure accurate, complete, and current. The ASBCA stated that the certification requirement applies to all cost or pricing data submitted by a contractor, and not to just one document alone.

Factor Calculations for Manufacturing Engineering and Engineering Labor. The ASBCA made a similar holding with respect to Texas Instruments' manufacturing engineering and engineering labor.¹⁴⁹ This part of the dispute concerned whether the factor calculations for both types of costs were cost or pricing data. The factors were percentages which expressed the ratio of total manufacturing engineering or sustaining engineering, respectively, to the total manufacturing labor cost. The ASBCA held that, although the factor calculations involved both facts and judgments, the proposed factors were cost or pricing data because they were derived from cost or pricing data. The board found no defective pricing, however, because the cost data from which the factors were derived was otherwise properly disclosed to the Navy.

Government Contractor Defense

Last year, we reported that three manufacturers of military aircraft successfully used the government contractor defense to shield themselves from liability for the deaths of military personnel caused by defects in government-approved specifications.¹⁵⁰ Another government contractor, however, was not so lucky in the Eleventh Circuit, where the defense was rejected.¹⁵¹ Not surprisingly, the Supreme Court decided to grant certiorari in *Boyle*¹⁵² to resolve the conflict between the circuits. The Court has not yet issued its opinion on just how broad the defense should be.¹⁵³

Gramm-Rudman-Hollings Act

The Balanced Budget and Emergency Deficit Control Act of 1985,¹⁵⁴ commonly called "Gramm-Rudman," still continues to influence our business. On 29 September 1987, the President signed legislation¹⁵⁵ to revise the budget law, a portion of which had been held unconstitutional in *Bowsher v. Synar*.¹⁵⁶ The legislation: restored automatic sequestration; required \$23 billion in mandatory debt reduction; and eased deficit targets for coming years. The key feature was taking the General Accounting Office out of the process of ordering sequestration. By assigning that role to the Office of Management and Budget (OMB), the

law avoids the constitutional separation of powers issue of having the Comptroller General, a member of the legislative branch, exercising executive powers. The revised law did not end the budget battles, however. Congress and the administration still had to find a way to cut the \$23 billion in spending mandated under the law, or else automatic sequestration would occur. In fact, the President signed the final sequestration order, and further legislation had to be enacted to avoid the automatic cuts.¹⁵⁷ Finally, after cuts and taxes had been agreed to by the administration and the Congress, legislation was signed for a \$600 billion appropriation for Fiscal Year 1988 on 21 December 1987. Thus, budget cuts will be a reality and will certainly affect government acquisitions in the next few years.

Debt Collection Act

The Debt Collection Act¹⁵⁸ did not have much activity this year. One case involving the propriety of the government's method of collecting by offset a debt admittedly owing did reach the issue of whether the government must comply with the Act.¹⁵⁹ The ASBCA decided that the government's failure to notify the contractor in writing of its intent to collect a claim by administrative offset rendered the offset improper. The government had agreed to permit repayment of the debt under specified contracts, but then withheld money due under other contracts without prior notice. The board held this to be improper under the Act.

Prompt Payment Act

The Prompt Payment Act (PPA)¹⁶⁰ and its parameters in government contracts was the subject of some litigation last year. The PPA requires that payment be made within thirty days after the receipt of a proper invoice, unless the contract provides otherwise, and that an interest penalty is assessed from that date if payment is not made within a fifteen-day grace period after the due date. In *Zinger Construction Co.*,¹⁶¹ the ASBCA held that a construction contractor was entitled to payment of interest on late progress payments. The government had argued that these progress payments were made solely for financing purposes, which are excluded from Prompt Payment Act coverage under OMB Circular A-125. The ASBCA found, however, that these payments were based upon the contract's percentage of completion rather than the contractor's incurred costs, and therefore were *not* made solely for financing purposes. The board determined that Army and Corps of

¹⁴⁹ ASBCA No. 23678, 87-3 B.C.A. (CCH) ¶ 20,195.

¹⁵⁰ *Tozer v. LTV Corp.* 792 F.2d 403 (4th Cir. 1986); *Dowd v. Textron, Inc.*, 792 F.2d 409 (4th Cir. 1986); *Boyle v. United Technologies Corp.*, 792 F.2d 413 (4th Cir. 1986).

¹⁵¹ *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1986).

¹⁵² 55 U.S.L.W. 1108 (U.S. Jan. 13, 1987) (No. 86-492).

¹⁵³ For an in-depth analysis of this subject, see Hurley, *Government Contractor Liability in Military Design Defect Cases: The Need For Judicial Intervention*, 117 Mil. L. Rev. 219 (1987).

¹⁵⁴ Pub. L. No. 99-177, 99 Stat. 1028 (1986) (codified at 2 U.S.C.A. §§ 901-922 (West Supp. 1987)).

¹⁵⁵ Pub. L. No. 100-119, 101 Stat. 754 (1987).

¹⁵⁶ 106 S. Ct. 3181 (1986).

¹⁵⁷ Fed. Cont. Rep. (BNA) No. 48, at 790 (Nov. 23, 1987).

¹⁵⁸ 31 U.S.C. §§ 3701-3731 (Supp. III 1985).

¹⁵⁹ *Snowbird Industries, Inc.*, ASBCA No. 33171, 87-2 B.C.A. (CCH) ¶ 19,862.

¹⁶⁰ 31 U.S.C. §§ 3901-3906 (Supp. III 1985).

¹⁶¹ ASBCA No. 31858, 87-3 B.C.A. (CCH) ¶ 20,043.

Engineer regulations, which exempted all progress payments from PPA coverage, would render meaningless OMB Circular A-125 language stating that receipt of a progress payment request shall be considered receipt of an invoice.

Alternative Dispute Resolution

Claims Court General Order

On 15 April 1987, the United States Claims Court issued General Order No. 13,¹⁶² which provides for the use of alternative dispute resolution (ADR) procedures in cases before that court. The order adopts two ADR techniques, minitrials and settlement judges, as methods to be used in appropriate cases to settle disputes. The methods adopted are voluntary and flexible, and should to be used early in the litigation process to minimize discovery costs. Both parties must agree to use the procedures. If the parties agree, they are to notify the presiding judge of their intent. If the judge agrees, the case will be assigned to a Claims Court judge who will preside over the ADR procedure adopted. If the ADR technique chosen fails to produce a settlement, the case will be returned to the presiding judge. Generally, all representations made during the course of the ADR proceeding are confidential and may not be used for any reason in subsequent litigation except as provided under the Federal Rules of Evidence.

Draft Recommendation of the Administrative Conference of the United States

Also on the ADR front, a committee of the Administrative Conference of the United States issued a draft recommendation urging agencies and boards of contract appeals to use more minitrials and other ADR procedures to resolve government contract disputes.¹⁶³ The draft recommendation explores ADR procedures, proposes several initiatives, and notes key considerations. ADR seems to be an issue that we will see more and more of in the future.

Potpourri

Voluntary Disclosure of Possible Fraud by Defense Contractors

Background

Last year, we reported that Deputy Secretary of Defense William H. Taft IV published a letter encouraging defense contractors to adopt a policy of voluntary disclosure of possible fraud as part of their corporate integrity programs. The Department of Justice (DOJ) did not publicly endorse this voluntary disclosure program when it came out, leaving room for speculation that the program would not survive.

DOJ Support of Voluntary Disclosure Program

Department of Justice support for the voluntary disclosure program finally came in February 1987 when Deputy Attorney General Arnold Burns sent Mr. Taft a memo endorsing the program and promising to issue guidelines to U.S. Attorneys on how to handle voluntarily disclosed wrongdoing. Then, in July 1987, the chief of DOJ's criminal division fraud section issued the promised guidance, which included a section describing the criteria to be used in deciding whether to prosecute the voluntarily disclosed wrongdoing. These criteria, to be applied on a case-by-case basis, include: the nature of the voluntary disclosure (how prompt and complete was it?); the existence of a compliance program and other preventive measures before the illegal activities occurred; the extent of the fraud as measured by dollar value of the loss to the government or cost of corrective actions; the pervasiveness of the fraud within the company; the level of corporate employees involved; and corporate cooperation and remedial action taken. The guidance states that prosecution remains likely in high-profile cases involving a threat to safety or national security, or an impact on the government of \$100,000 or more.¹⁶⁴

Clarification of Scope of Program

Meanwhile, Mr. Taft sent another letter to the nation's biggest defense contractors in August 1987 that was intended to clarify three aspects of the voluntary disclosure program. First, disclosure is encouraged but is *not* legally or contractually required. Second, DOD will not normally decide whether to suspend or debar a contractor solely on the basis of the voluntary disclosure, but will wait instead until after it has completed its own investigation. Finally, DOD will recognize contractor cooperation in DOD investigations *not* resulting from a voluntary disclosure as a mitigating factor in suspension and debarment determinations.¹⁶⁵

New DFARS Rule

Finally, the DAR Council issued a final rule emphasizing the voluntary nature of the disclosure program.¹⁶⁶ New DFARS subpart 3.7000, effective 1 October 1987, is consistent with the guidance in Mr. Taft's letter in this regard. This DFARS subpart also lists eight mitigating factors that will be considered, including self-governance programs and timely disclosure of possible fraud, in every determination whether to suspend or debar a contractor.

DCAA Subpoena Power

In an opinion that significantly limits the scope of the Defense Contract Audit Agency's (DCAA) subpoena power under 10 U.S.C.A. § 2313(d)(1) (West Supp. 1987), a district court held that DCAA does not have authority to subpoena a contractor's internal audit reports. The court in *Newport News Shipbuilding & Drydock Co. v. Reed*¹⁶⁷ found

¹⁶² General Order No. 13, Claims Court's Order Providing for the Use of Alternative Dispute Resolution Procedures (15 Apr. 1987), reprinted in Fed. Cont. Rep. (BNA) No. 47, at 679 (Apr. 20, 1987).

¹⁶³ Fed. Cont. Rep. (BNA) No. 48, at 715 (Nov. 9, 1987).

¹⁶⁴ Fed. Cont. Rep. (BNA) No. 48, at 197-98 (Aug. 17, 1987).

¹⁶⁵ Letter from William H. Taft IV, 10 Aug. 1987, reprinted in Fed. Cont. Rep. (BNA) No. 48, at 198-99 (Aug. 17, 1987).

¹⁶⁶ 52 Fed. Reg. 34,386 (1987).

¹⁶⁷ 655 F. Supp. 1408 (E.D. Va. 1987).

that Congress did not intend to expand DCAA's access to records authority when it gave DCAA the power to subpoena records related to costs incurred in the negotiations, proposals, and performance of particular contracts.¹⁶⁸ Internal audit reports, though charged to the government as costs of overhead or general and administrative expenses, are used for internal management control and are therefore not the type of pricing data that DCAA has traditionally had access to in the past. Because DCAA was given the subpoena power only to help it enforce its existing rights under FAR § 52.215, the court concluded that DCAA cannot get at these types of records, at least through its own subpoena process.¹⁶⁹ Its subpoena power is not as broad as that granted to the Inspector General under the 1982 Inspector General Act.

Commercial Activities Program

On 19 November 1987, President Reagan signed Executive Order 12,615, which requires every agency to identify by 29 April 1988 all of its commercial activities, and to schedule by 30 June 1988 cost studies for all such commercial activities. The order also requires that all new requirements for commercial activities be performed by private industry except in cases of national security, or where costs are unreasonable. Also, DOD must schedule reviews covering 25,000 full time equivalents in FY 1988, and not less than three percent of its total civilian population in each fiscal year thereafter. Agencies must also submit, in their budget proposals to OMB, estimates of their expected yearly budget savings from the implementation of their commercial activities programs. They may, however, negotiate with OMB to retain some of these savings for use as incentive compensation to reward employees covered by the studies for their productivity efforts, or for use in other productivity enhancement projects. Finally, agencies must develop job placement programs for employees affected by contracting out, and must appoint a senior-level official to coordinate its commercial activities program.

As a result of this Executive Order, OMB plans to issue a new OMB Circular A-76 in early 1988, which is expected to include provisions giving agencies more authority to contract out without having to conduct costly cost studies.

Small Business and 8(a) Contractor Cases

Conflict of Interest Justifies VA's Refusal to Make Award to 8(a) Offeror

In *Refine Construction Company v. United States*,¹⁷⁰ the Veteran's Administration (VA) refused to make an award of an 8(a) set aside contract after completion of negotiations. The VA's refusal was based upon the fact that a VA employee had prepared part of the offeror's cost estimate and had participated in some contract negotiations as a

"consulting engineer." The plaintiff argued that it was entitled to a hearing because it had been deprived of a property right, and it also asked for bid preparation costs. The court distinguished a refusal to award based upon a faulty procurement (i.e., tainted by the participation of the VA employee) from a refusal based upon a prospective contractor's lack of integrity. While a hearing might be required in the latter circumstances, the former required none.

Bankruptcy and 8(a) Contracts

During the base period of a food services contract, an 8(a) contractor filed a Chapter 11 bankruptcy petition.¹⁷¹ Although the contractor continued to perform the contract, the contracting officer decided that, because of the bankruptcy petition, the options under the contract would not be exercised. Holding that an 8(a) contract is essentially a franchise because it noncompetitively grants to the awardee an exclusive right to perform the services for the life of the contract, the Fifth Circuit decided that this action violated 11 U.S.C. § 525(a) (Supp. III 1985), which states that a governmental unit may not refuse to renew a license, permit, franchise, or other similar grant solely because the person is or has been a debtor under the Bankruptcy Act. Accordingly, the court ordered that the first option be exercised.

Options and 8(a) Contracts

GAO has held that agencies may exercise existing options in 8(a) contracts regardless of whether the 8(a) contractor remains eligible to participate in the 8(a) program or has lost its 8(a) status at the time of the exercise.¹⁷² Even if an agency has a continuing need for the services being provided under an 8(a) contract, however, it is improper for the agency to extend a contract that contains no further options if the contractor has lost its eligibility to participate in the 8(a) program.¹⁷³

8(a) Contracts and Handicapped Persons

A district court in Maryland ruled that a contractor who suffered from the handicaps of calligraphic dysgraphia and dyslexia, which cause an individual to reverse numbers and letters when writing and reading, is not a "socially disadvantaged" contractor for the purposes of the 8(a) program. The contractor had not been subject to racial or ethnic prejudice or cultural bias because of his membership in a group without regard to his individual qualities.¹⁷⁴

Certificates of Competency

The First Circuit upheld a district court's declaratory judgment that a Certificate of Competency issued by the Small Business Administration (SBA) was invalid, and a subsequent order that the Navy award a contract to the next low, responsive, responsible bidder. The court decided

¹⁶⁸ FY 1985 Defense Authorization Act, Pub. L. No. 98-525, 98 Stat. 2492 (1985).

¹⁶⁹ Note that DCAA could ask the DOD Inspector General to subpoena these internal audit reports, as it did in *United States v. Westinghouse*, 788 F.2d 164 (3rd Cir. 1986).

¹⁷⁰ 12 Cl. Ct. 56 (1987).

¹⁷¹ *In re Exquisito Services, Inc.*, 823 F.2d 151 (5th Cir. 1987).

¹⁷² *Gallegos Research Corp.—Reconsideration*, Comp. Gen. Dec. B-209992.2, B-209992.3 (21 Nov. 1983), 83-2 CPD ¶ 597.

¹⁷³ *Acumenics Research and Technology, Inc.—Contract Extension*, Comp. Gen. Dec. B-224702 (5 Aug. 1987), 87-2 CPD ¶ 128.

¹⁷⁴ *Doe v. Heatherly*, 671 F. Supp. 1081 (D. Md. 1987).

that, although 15 U.S.C. § 634(b)(1) (1982) prohibits courts from issuing injunctions against the SBA, a declaratory judgment is a different and milder remedy that is not so prohibited.¹⁷⁵

Responsibility Determinations of Small Businesses

When the Defense Logistics Agency determined a small business to be not responsible, it referred the matter to the Small Business Administration for a possible Certificate of Competency (COC). When the SBA did not issue the COC within the required fifteen business days, the contracting officer was authorized to make the contract award to the next low responsive responsible bidder under FAR § 19.602-2(a). Before the award could be made, however, the SBA notified the contracting officer of its intent to issue the COC. Relying on the fifteen-day rule, the contracting officer attempted to award the contract to the next low bidder, and the small business protested. The GAO sustained the protest, holding that the agency is bound by the SBA's late COC determination if it has not yet made the award.¹⁷⁶

Suspensions and Eligibility for Award

General

Two Comptroller General decisions in 1987 helped to clarify the current law regarding whether an agency may consider a suspended contractor eligible for contract award. Prior to the implementation of the FAR in 1984, GAO had held that a firm suspended at the time of bid opening nevertheless could receive an award if the suspension was removed prior to award.¹⁷⁷

Sealed Bid Procurements

Section 14.402-2(g) of the FAR, however, included specific language stating that sealed bids received from contractors who are suspended or debarred as of the bid opening date must be rejected. Therefore, GAO overruled its prior inconsistent decision in *Skip Kirchdorfer, Inc.*¹⁷⁸ and held that suspended firms at the time of bid opening may not be considered for award even if the suspension is lifted prior to award.¹⁷⁹

Negotiated Procurements

Because FAR § 14.402-2(g) applies only to sealed bidding, however, the rule is different for negotiated procurements. In *Aero Corporation*,¹⁸⁰ the Comptroller General ruled that a proposal from an offeror who was suspended at the time of receipt of initial proposals may nevertheless be considered for award if the suspension is lifted before the award is made.

Bidder's Responsibility

In *RACO Services, Inc.*,¹⁸¹ the Interior Board of Contract Appeals (IBCA) denied the government's claim for excess procurement costs. Prior to award, the contractor had informed the contracting officer that it was experiencing financial difficulties and would not be able to perform. The contracting officer contended that the award was proper because he had relied on a Dun and Bradstreet report indicating that the bidder was financially responsible. The IBCA held that the contracting officer had an affirmative duty, based on the contractor's notice, to determine the accuracy of the information and, if true, not to enter into a contract with a nonresponsible bidder. The award of the contract was therefore held to be a nullity.

Choosing the Method of Acquisition

The Competition in Contracting Act (CICA)¹⁸² directs federal agencies to use the method of acquisition best suited to the facts and circumstances of the procurement. Prior to CICA, formal advertising (now sealed bidding) was the statutorily preferred method of acquisition, and the negotiation method (competitive proposals) could only be used if one of seventeen exceptions existed. But CICA now requires federal agencies to use sealed bidding if time permits, award will be based on price or price-related factors, it is not necessary to conduct discussions with bidders, and more than one bid is reasonably expected. The Comptroller General therefore ruled that when these four factors are met, the agency must use sealed bidding. The Comptroller General stated that Congress, in changing the statutory language on methods of acquisition, did not intend to leave to the complete discretion of the contracting officer the decision as to whether to use sealed bidding or competitive proposals.¹⁸³

Competition

In *Packaging Corporation of America*,¹⁸⁴ the GAO held that the agency had failed to properly solicit the incumbent contractor. The incumbent had requested a copy of the solicitation, but did not receive one. The agency argued that the solicitation was valid because it had sent notice of it to 287 firms on its mailing list. The GAO stated, however, that the mailing list was misleading because only three known firms could provide the item. Furthermore, the agency should have expected the incumbent to be interested, especially in light of the magnitude of the procurement.

¹⁷⁵ *Ulstein Maritime, Ltd. v. United States*, No. 86-2127 (1st Cir. Nov. 25, 1987).

¹⁷⁶ *Age King Industries, Inc.*, Comp. Gen. Dec. B-225445.2 (17 Jun. 1987), 87-1 CPD ¶ 602.

¹⁷⁷ *Kings Point Mfg. Co.*, Comp. Gen. Dec. B-210389.4, *et al.* (14 Dec. 1983), 83-2 CPD ¶ 683.

¹⁷⁸ Comp. Gen. Dec. B-215784 (3 Dec. 1984), 84-2 CPD ¶ 606.

¹⁷⁹ *Southern Dredging Co.*, Comp. Gen. Dec. B-225402 (4 Mar. 1987), 87-1 CPD ¶ 245. *But see* DFARS § 9.405(a)(1), which allows such consideration if the government determines in writing that there is a compelling reason to make an exception.

¹⁸⁰ Comp. Gen. Dec. B-227026, B-227026.2 (24 July 1987), 87-2 CPD ¶ 82.

¹⁸¹ IBCA No. 260, 87-1 B.C.A. (CCH) ¶ 19,653.

¹⁸² Pub. L. No. 98-369, 98 Stat. 1191 (1985) (codified at 10 U.S.C.A. § 2304 (West Supp. 1987)).

¹⁸³ *ARO Corp.*, Comp. Gen. Dec. B-227055 (17 Aug. 1987), 87-2 CPD ¶ 165.

¹⁸⁴ Comp. Gen. Dec. B-225823 (20 Jul. 1987), 87-2 CPD ¶ 65.

Evaluation Criteria

In a recent case, a disappointed bidder protested the award of a Navy contract to a competitor under an oral request for proposals.¹⁸⁵ The issue in the protest was whether the new provision regarding evaluation factors in award of contracts requires that offerors' relative technical quality be included as an evaluation factor in all solicitations. The Comptroller General ruled that the provision requires only that the solicitation specify the importance of technical quality relative to the other evaluation factors. The provision does not require that the relative technical quality of competing proposals be included as an evaluation factor in all solicitations. In the instant case, the Navy correctly indicated the relative importance of technical quality in the evaluation scheme by specifying that the award would be made to the lowest priced, technically acceptable offeror.

Mistakes in Bid

In *Sylvan Service Corporation*,¹⁸⁶ the Comptroller General held that a bid of annual rather than the requested monthly prices was an obvious clerical mistake that could be corrected, even though it would displace an otherwise low bidder. The GAO held the mistake correctable because the "monthly" prices were grossly out of line with the other bids, dividing the "monthly" prices by twelve brought the bid back into line, and the bidder had submitted worksheets confirming the mistake and the intended bid.

*Veteran's Administration—Advance Decision*¹⁸⁷ also concerned a mistake in bid. The protestor's apparent low bid contained a price for one item that was approximately ten times lower than the government estimate. The protestor verified its bid, stating that it had made a mistake in the item price, but that its total bid was correct. The GAO held that the bid was properly rejected because there was no evidence to support the intended bid as the bidder had destroyed all its paperwork.

Improper Bid Modification

The GAO held in *Government Contract Services*¹⁸⁸ that the protestor's bid modification was properly rejected. The bid modification had been hand-printed in designated type-written spaces on the face of the protestor's bid envelope. The modification did not, however, contain any evidence showing that the person signing the modification had the authority to modify the bid.

Descriptive Literature

In response to an invitation for bids requiring the submission of descriptive literature, a bidder submitted its standard commercial literature describing the item to be

furnished. This literature also contained a preprinted legend stating "prices and data subject to change." The Comptroller General held that this type of preprinted language, by itself, could not be reasonably regarded as having qualified the bid, which otherwise established precisely what the bidder was offering and at what price. Because there was no intent to qualify the bid, the Comptroller General held the bid responsive.¹⁸⁹

Labor Standards

Conformed Wage

In *Sunstate International Management Services*,¹⁹⁰ GAO held that the government is not liable for the higher costs when a contractor's conformed wage is determined by the Department of Labor (DOL) to be too low. A conformed wage is computed by a contractor when an employee classification is not covered by a wage rate determination. This is accomplished by conforming the unlisted classification to some other reasonably related enumerated classification in the wage rate determination. This conformed wage is reported to DOL, which either approves, modifies, or disapproves it. The protestor argued that the government should reimburse the contractor when a proposed conformed wage is held to be too low. The GAO held that the applicable regulations did not obligate the government to reimburse the contractor. Furthermore, requiring the government to reimburse contractors could encourage bidders to propose unreasonably low conformed wages.

ASBCA Jurisdiction

In *Spectrum American Contractors*,¹⁹¹ the contractor attempted to recover monies withheld for alleged wage rate violations. In dismissing the claim for lack of a final decision, the ASBCA stated that even if there had been a final decision, it would lack jurisdiction. The contract had mistakenly included an outdated "Disputes Concerning Labor Standards" clause, which divides jurisdiction between DOL and the ASBCA. The current clause gives DOL exclusive jurisdiction over disputes concerning labor standards. The ASBCA stated that because the current clause had been required in but inadvertently excluded from the contract, it would be read into the contract pursuant to the *Christian*¹⁹² doctrine.

Terminations

Convenience Terminations: No Change in Circumstances

In *Dr. Richard Simmons*,¹⁹³ the contractor argued that *Torncello v. United States*¹⁹⁴ established a rule that a convenience termination is valid only where there is a "change

¹⁸⁵ *Cerberonics, Inc.*, Comp. Gen. Dec. B-227175 (2 Sept. 1987), 87-2 CPD ¶ 217.

¹⁸⁶ Comp. Gen. Dec. B-227420 (19 Aug. 1987), 87-2 CPD ¶ 180.

¹⁸⁷ Comp. Gen. Dec. B-225815.2 (15 Oct. 1987), 87-2 CPD ¶ 362.

¹⁸⁸ Comp. Gen. Dec. B-226885 (27 Aug. 1987), 87-2 CPD ¶ 204.

¹⁸⁹ *Tektronix, Inc.; Hewlett Packard Co.*, Comp. Gen. Dec. B-227800 (29 Sept. 1987), 87-2 CPD ¶ 315.

¹⁹⁰ Comp. Gen. Dec. B-227036 (31 July 1987), 87-2 CPD ¶ 124.

¹⁹¹ ASBCA No. 33039, 87-1 B.C.A. (CCH) ¶ 19,864.

¹⁹² See *G.L. Christian & Associates v. United States*, 160 Ct. Cl. 1, cert. denied, 375 U.S. 954 (1963), on later review, 170 Ct. Cl. 902, cert. denied, 382 U.S. 821 (1965).

¹⁹³ ASBCA No. 34049, 87-3 B.C.A. (CCH) ¶ 19,984.

¹⁹⁴ 681 F.2d 756 (Ct. Cl. 1982).

in circumstances." The ASBCA, however, stated that it will continue to follow the bad faith/abuse of discretion rule until the "change in circumstances" test is adopted by a clear majority of the Claims Court.

Default Terminations

Abuse of Discretion: It's the Thought That Counts. In *Darwin Construction Co., Inc. v. United States*,¹⁹⁵ the Court of Appeals for the Federal Circuit held that a default termination is a discretionary act. This case overruled the long-standing ASBCA rule announced in *Nuclear Research Associates, Inc.*,¹⁹⁶ that the motives or judgment of a contracting officer would not be considered in determining the propriety of a default termination. Under the old ASBCA rule, the validity of the termination hinged solely on whether the contractor was technically in default under the terms and conditions of the contract. Now, under the *Darwin* rule, the contracting officer's exercise of discretion will be measured against the procedures and guidelines established in FAR §§ 49.402-3 and 49.402-4.

Abuse of Discretion: Failure to Terminate. In *Ohio Casualty Insurance Co. v. United States*,¹⁹⁷ the Claims Court found that the contracting officer had abused his discretion and breached the duty owed to a surety by not terminating a contract. Although the contracting officer had clear indications of the contractor's dishonesty and incompetence, he had given the contractor \$2.7 million and three years to partially complete a job that should have been totally completed in about nine months for about \$2.6 million.

Under the Gunn: Burden Of Proof In Default Terminations. Under *Gunn-Williams v. United States*,¹⁹⁸ either the contractor or the government must assert a monetary claim

to trigger a final decision. In *Lisbon Contractors, Inc. v. United States*,¹⁹⁹ the contractor submitted a certified claim for costs under the termination for convenience clause, asserting that its default termination was improper. The government argued that, because the party asserting a claim normally bears the burden of proof, the contractor should bear the burden of proving the impropriety of the default termination as part of its claim under the convenience clause. The court, however, noted the "long-established government contract law" that the government bears the burden of proving the propriety of a default termination, and decided that the government bears the burden of proof on the default regardless of whose claim is being asserted.

Prompt Payment Act

The Office of Management and Budget decided that DOD should be allowed to continue its current practice of making progress payments within seven to ten days after receipt of an invoice. This practice is contrary to the thirty-day payment standard contained in OMB Circular A-125, which is based on saving the government interest costs. DOD had countered that less frequent progress payments would increase contractor costs, which would be passed along to the government.²⁰⁰

Conclusion

This article should assist field attorneys in staying current in government contract law. Attorneys should be alert to new developments. We will try to keep you abreast of new developments through publication of contract law notes in the TJAGSA Practice Notes section of *The Army Lawyer*.

¹⁹⁵ 811 F.2d 1987 (Fed. Cir. 1987).

¹⁹⁶ ASBCA No. 13563, 70-1 B.C.A. (CCH) ¶ 8,237.

¹⁹⁷ 12 Cl. Ct. 590 (1987).

¹⁹⁸ 8 Cl. Ct. 531 (1985).

¹⁹⁹ 828 F.2d 759 (Fed. Cir. 1987).

²⁰⁰ Fed. Cont. Rep. (BNA) No. 48, at 529 (Oct. 12, 1987).

Everything You Always Wanted to Know About Terry Stops—But Thought It Was a Violation of the Fourth Amendment to Stop Someone and Ask

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Introduction

The fourth amendment ensures that "The right of the people to be secure in their persons, houses, papers and effects, against *unreasonable searches* and seizures, shall not be violated, and *no Warrants* shall issue, but upon *probable cause*" The Founding Fathers' search and seizure provision included two distinct clauses, the first relating to

reasonable searches and the second relating to *warranted* searches. While the qualification of *probable cause* appears to pertain only to warranted searches, it became settled law that the probable cause requirement was also a condition precedent to a *reasonable* search.² Then, in the landmark case of *Terry v. Ohio*,³ decided in 1968, the Supreme Court recognized for the first time the limited authority of police

¹ U.S. Const. amend. IV (emphasis added).

² See generally W. LaFare, *Search and Seizure, A Treatise on the Fourth Amendment* § 3.1(a) (2d ed. 1987).

³ 392 U.S. 1 (1968).

to "search" and "seize" a person within the meaning of the fourth amendment on less than probable cause. The so-called "Terry stop" recently has received considerable attention by the Supreme Court; since 1983 the Court has addressed aspects of the doctrine on numerous occasions.⁴ In the military context, developments in the *Terry* line of cases similarly have generated a number of military court decisions. Despite the proliferation of cases, many questions remain unanswered and more judicial activity in this area is expected.

An investigative detention or search is lawful under the *Terry* doctrine if three conditions are met. First, the search or detention must be supported by the requisite degree of suspicion; under the *Terry* doctrine, "reasonable suspicion" rather than "probable cause" is the standard. Second, the intrusion must be justified by important governmental interests. Finally, the invasion of privacy or restriction of liberty must be *minimally intrusive* of the individual's privacy and liberty interests. In determining whether the intrusion of privacy or restriction of liberty is sufficiently restrained, the nature of the governmental interests at stake must be weighed against the intrusion of individual privacy or liberty interests. This balancing test has been referred to as the *Terry* balancing test. The search or seizure is proper only if the intrusion is justified in light of the governmental interests and the nature of the intrusion.

This article will examine in turn the three parts of a lawful *Terry* search or detention: reasonable suspicion, important governmental interests, and minimally intrusive police actions.

Was the Seizure Based on Reasonable Suspicion?

If an individual or his property has been searched or seized within the meaning of the fourth amendment, the lawfulness of the search or seizure will depend upon whether the law enforcement official who conducted the search or seizure possessed the requisite degree or quantum of suspicion to satisfy the requirements of the fourth amendment. If the evidence supports a "probable cause" determination, the suspect may be arrested and subjected to a search incident to arrest,⁵ or his property may be subjected to a warranted or unwarranted search and seizure. If the evidence is so flimsy that it amounts to no more than "an inchoate and unparticularized suspicion or 'hunch,'" ⁶ the search or restriction on liberty is unlawful and evidence obtained as a result thereof may be excluded from evidence.

Somewhere between "probable cause" and a "mere hunch" lies the "reasonable suspicion" standard.

Characterization of the degree of suspicion may be of crucial importance at trial. If the government is successful in establishing that its information amounts to probable cause, the thoroughness of the search or the nature of the restriction on liberty becomes less critical. If the suspicion is only a "reasonable suspicion," the government must articulate some important governmental interest to justify the search or seizure *and* the government must establish that the search or seizure was minimally intrusive of protected privacy and liberty interests. These issues will be discussed in subsequent sections.

The parameters of "reasonable suspicion" were affected by the Supreme Court's decision in *Illinois v. Gates*.⁷ In *Gates*, the Court abandoned the two-prong *Aguilar/Spinelli*⁸ test for probable cause and adopted a more flexible "totality of the circumstances" standard. By redefining the standard for evaluation, the Court almost certainly lowered the threshold of probable cause. The Court said that the task of the issuing magistrate in determining probable cause "is simply to make a practical, commonsense decision whether . . . there is a *fair probability* that contraband or evidence of a crime will be found in a particular place."⁹ The immediate impact of *Gates* on *Terry* stop cases is that courts are more likely to find probable cause in close cases and thereby dispense with the need to undertake the *Terry* balancing test.¹⁰

A "reasonable suspicion" must be based upon articulable, objective facts, together with rational inferences that can be drawn from those facts. Courts further recognize that experienced police may reasonably draw inferences from facts that would not be apparent to an untrained bystander. By way of illustration, some of the situations that the courts have found not to give rise to a "reasonable suspicion" include: being present in an alley in a high crime area at night;¹¹ departing a train coming from a city thought to be a source of drugs;¹² being of Mexican ancestry while driving a vehicle in an area where illegal immigration is a problem;¹³ being an American soldier in Germany driving a vehicle with German registration;¹⁴ and fleeing from the police.¹⁵

Factors that have justified a "reasonable suspicion" include: receiving a "wanted flyer" issued by another police agency;¹⁶ driving erratically or obviously attempting to

⁴ See *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *Hayes v. Florida*, 470 U.S. 811 (1985); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984); *Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Place*, 462 U.S. 696 (1983); *Florida v. Royer*, 460 U.S. 491 (1983).

⁵ See, e.g., *United States v. Kinane*, 1 M.J. 309 (C.M.A. 1976).

⁶ *Terry*, 392 U.S. at 27.

⁷ 462 U.S. 213 (1983).

⁸ The *Aguilar/Spinelli* test was developed from *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969).

⁹ 462 U.S. at 238 (emphasis added).

¹⁰ See, e.g., *United States v. Scott*, 22 M.J. 297 (C.M.A. 1986).

¹¹ See *Brown v. Texas*, 443 U.S. 47 (1979).

¹² See *United States v. Foster*, 11 M.J. 530 (A.C.M.R. 1981).

¹³ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

¹⁴ See *United States v. Swinson*, 48 C.M.R. 197 (A.F.C.M.R. 1974).

¹⁵ See, e.g., *Wong Sun v. United States*, 371 U.S. 471, 483 n.10 (1963); *United States v. Robinson*, 6 M.J. 109 (C.M.A. 1979); *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985). But see *Lawrence v. United States*, 509 A.2d 614 (D.C. 1986) (flight may be evidence of consciousness of guilt).

¹⁶ See *United States v. Hensley*, 469 U.S. 221 (1985).

evade police officers when coupled with other objective indicia of criminal activity;¹⁷ driving a heavily loaded vehicle on a route used for importing illegal aliens¹⁸ or drugs;¹⁹ receiving a corroborated tip from an unknown or untested informant concerning drug activities;²⁰ meeting the "drug courier profile";²¹ departing a train coming from a city thought to be a source for drugs accompanied by a known heroin dealer and apparently under the influence of an intoxicant;²² running from the shadow of one building to the next at night carrying a large box;²³ and, observing an apparent drug transaction, i.e., two persons exchanging what appears to be money for a small package that is quickly concealed.²⁴

Clearly, no exhaustive listing of factors which support a reasonable suspicion can be compiled. The existence of "reasonable suspicion," or lack thereof, must be decided on a case-by-case basis. It is important to remember, however, that the clarity with which the witness is able to describe the suspicious activity and explain the inferences drawn is critically important to the "reasonable suspicion" determination.

Identifying Special Governmental Interests That Justify a Terry Stop and Search

The Terry Balancing Test

Because a *Terry* search or detention is based on less than probable cause, it will be deemed "reasonable" under the fourth amendment only if it is minimally intrusive of the individual's fourth amendment rights and protects important governmental interests. Thus, in every case where there has been a search or detention based only on "reasonable suspicion," the court must determine whether any important governmental interests were involved and whether the nature and extent of the search or detention were minimally intrusive of the individual's fourth amendment rights. This balancing process has been referred to as the *Terry* balancing test.

Special Governmental Interests

In *Terry v. Ohio*, Detective Martin McFadden, a veteran of some thirty-nine years with the Cleveland Police Department, observed Terry and a man named Chilton "casing" a

store for a stickup. A while later, Terry and Chilton were joined by a third person. After watching them for some time, McFadden approached them, identified himself as a policeman, and asked their names. Terry had his back to Officer McFadden. When Terry mumbled something, McFadden spun him around and patted down the outside of his clothing. He discovered a pistol.²⁵

In applying the *Terry* balancing test, the Supreme Court found that two major governmental interests were involved. The first was crime prevention and crime detection; more specifically, the need to prevent imminent and ongoing crime. Elaborating on this governmental interest, the Court in *Adams v. Williams*²⁶ noted that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."²⁷ The second governmental interest mentioned in *Terry* was the safety of police officers. Citing an FBI Crime report on law enforcement officers' death in the line of duty,²⁸ the Court found that it was necessary for police to have the power to frisk a suspect for a weapon and to neutralize the threat of physical harm.²⁹

When these governmental interests were balanced against the "severe, though brief, intrusion upon cherished personal security"³⁰ occasioned by a pat-down of outer clothing, the Court found that the search was reasonable under the fourth amendment.³¹

Since *Terry*, the Court has identified a number of governmental interests that may justify a limited intrusion of fourth amendment rights. In *United States v. Brignoni-Ponce*,³² the Court found that the government's interest in effectively stemming the flow of illegal aliens into the United States was of such magnitude as to allow brief stops based on reasonable suspicion by roving patrols along the Mexican/American border. In *Michigan v. Summers*,³³ the Court found three governmental interests in detaining the occupant of a premise during a search pursuant to a valid search warrant. They included: "preventing flight in the event incriminating evidence is found, . . . minimizing the

¹⁷ See *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

¹⁸ See *Brignoni-Ponce*, 422 U.S. at 885.

¹⁹ See *Sharpe*, 470 U.S. at 675.

²⁰ See *Adams v. Williams*, 407 U.S. 143, 146 (1976); *United States v. Gillis*, 8 M.J. 118 (C.M.A. 1978); *United States v. Edwards*, 3 M.J. 921 (A.C.M.R. 1977).

²¹ See *United States v. Place*, 462 U.S. 696, 698 (1983); *Florida v. Royer*, 460 U.S. 491, 493 (1983); *United States v. Mendenhall*, 446 U.S. 544, 547 (1980).

²² See *United States v. Thomas*, 10 M.J. 687, 689 (A.C.M.R. 1981).

²³ See *United States v. Yandell*, 13 M.J. 616 (A.F.C.M.R. 1982).

²⁴ See *United States v. Sanford*, 12 M.J. 170, 171-72 (C.M.A. 1981).

²⁵ 392 U.S. 1, 6-7 (1968).

²⁶ 407 U.S. 143 (1976).

²⁷ *Id.* at 145.

²⁸ 392 U.S. at 24 n.21.

²⁹ *Id.* at 27.

³⁰ *Id.* at 24-25.

³¹ *Id.* at 30.

³² 422 U.S. 873 (1975); see also *I.N.S. v. Delgado*, 466 U.S. 210 (1984) (Powell, J., concurring).

³³ 452 U.S. 692 (1981).

risk of harm . . . to both the police and the occupants,"³⁴ and, facilitating the "orderly completion of the search."³⁵ Finally, in several cases³⁶ the Court has recognized the significant governmental interest in detecting those "who would traffic in deadly drugs for personal profit."³⁷

Until *United States v. Hensley*,³⁸ the Court had found no governmental interest so compelling as to warrant a *Terry* stop in a case where the crime had long since been completed; the important governmental interests previously articulated all addressed prevention and detection of imminent or ongoing crime.³⁹ In *Hensley*, police officers from St. Bernard, Ohio, a suburb of Cincinnati, received a tip from an informant that Thomas Hensley had robbed a tavern. The St. Bernard Police Department printed a "wanted flyer" for Hensley and distributed it to other police departments in the Cincinnati area. Six days later, police officers in Covington, Kentucky, another suburb of Cincinnati, stopped Hensley based upon the wanted flyer.⁴⁰

The Court noted that the governmental interests in making a stop to investigate past criminal conduct were different from the interests involved in preventing or detecting criminal conduct. First, such a stop has no prevention or detection purpose because there is no ongoing or imminent criminal activity.⁴¹ Second, the exigencies requiring a police officer to step in to prevent a crime are not present.⁴² Third, because the crime has been committed, the police have greater latitude to choose the time and place to talk to the suspect. Nevertheless, the Court found a compelling governmental interest in stopping a person suspected of a past felony or threat to public safety. That interest, simply stated, is the "strong government interest in solving crimes and bringing offenders to justice."⁴³

Perhaps the most far reaching case in identifying governmental interests that justify a search or detention based only on reasonable suspicion is *New Jersey v. T.L.O.*⁴⁴ In *T.L.O.*, a fourteen-year-old high school freshman, Terry Lee Owens, was found smoking in the lavatory in violation of school rules. Ms. Owens was taken to Assistant Vice Principal Theodore Choplick. In response to Mr. Choplick's questioning, Ms. Owens denied smoking in the lavatory and claimed she did not smoke at all. Mr. Choplick demanded to see her purse. He opened it and discovered a pack of cigarettes and a pack of rolling papers.

Based upon his experience, he believed the cigarette papers might be associated with marihuana use. He conducted a thorough search of the purse and discovered a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money, an index card with names of people who owed her money, and two letters implicating Ms. Owens in marihuana dealing.

The Court rejected the government's arguments that the fourth amendment did not apply to searches by public school officials and that children had no legitimate expectations of privacy with regard to items brought onto school property. Nevertheless, the Court recognized that the privacy rights of students under the fourth amendment must be balanced against unique needs of an educational institution:

Against the child's interest must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.⁴⁵

Based upon these special governmental needs, namely discipline, good order, and security, the Court sanctioned limited warrantless searches based only upon reasonable suspicion. Other considerations mentioned by the Court favoring such a rule included the value of preserving informal relationships between student and teacher and recognition that such a rule would spare teachers "the necessity of schooling themselves in the niceties of probable cause."⁴⁶

The impact of *T.L.O.* on the military could be significant.⁴⁷ The importance of maintaining good order, discipline, and security of the military unit or installation would seem to be of sufficient magnitude to weigh against a soldier's right to privacy. Moreover, the need of a commander or superior to have a degree of flexibility in dealing with subordinates counsels against imposition of the rigid warrant requirement. Finally, a standard of reasonable suspicion would free military commanders and superiors from learning and applying subtle rules involving probable cause. The issues raised by *T.L.O.* are indeed tantalizing and invite aggressive litigation at the trial and appellate levels.

³⁴ *Id.* at 702-03.

³⁵ *Id.* at 703.

³⁶ See *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *Sharpe*, 470 U.S. 675 (1985); *Place*, 462 U.S. 696 (1983); *Mendenhall*, 446 U.S. 544 (1980).

³⁷ *Mendenhall*, 446 U.S. at 561 (Powell, J., concurring in part).

³⁸ 469 U.S. 221 (1985).

³⁹ The Court had previously hinted in a footnote that a *Terry* stop may be proper when investigating an offense that had already occurred. *United States v. Cortes*, 449 U.S. 417 n.2 (1981).

⁴⁰ 469 U.S. at 223-25.

⁴¹ *Id.* at 228.

⁴² *Id.* at 229.

⁴³ *Id.*

⁴⁴ 469 U.S. 325 (1985).

⁴⁵ *Id.* at 339.

⁴⁶ *Id.* at 343.

⁴⁷ See generally Stevens, *New Jersey v. T.L.O.: Towards a More Reasonable Standard for Military Search Authorizations*, 25 A.F.L. Rev. 338 (1985).

Drawing the Line Between Searches and Detentions, and Law Enforcement Activities That Implicate No Fourth Amendment Interests

If the government can establish that the interaction between a law enforcement official and an individual did not amount to a search or seizure, there are no fourth amendment issues raised and no further inquiry need be made. On the other hand, if the interaction constitutes an interference with fourth amendment privacy or liberty interests, then the protections of the fourth amendment may be triggered. Naturally, there is a significant advantage to the government in successfully characterizing police contact as something less than a search or seizure under the fourth amendment. Indeed, in *Terry* the government argued that a brief investigatory detention and search of a suspicious character for the limited purpose of a "frisk" or "pat-down" was not a search or seizure at all. The Court rejected that argument, and concluded that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."⁴⁸

Nevertheless, not all interactions between law enforcement personnel and the citizenry constitute an intrusion upon fourth amendment privacy or liberty interests. Clearly, no fourth amendment liberty interests are implicated when a policeman stops an individual on the street and asks a few questions. The difficulty in this area is in drawing a line between law enforcement activities that are so nonintrusive that no privacy or liberty interests are implicated and those activities in which the policeman has stepped over the line and interfered with liberty or privacy interests protected by the fourth amendment.

Stops in Connection With Surveillance Operations

Police agencies often establish surveillance operations in high crime areas, or on known drug trafficking or illegal alien importation routes. Typically, the police are not looking for specific individuals, but for behavior patterns, such as the so-called "drug courier profile,"⁴⁹ that suggest criminal activity is afoot. When they observe a suspicious individual, they initiate contact with the suspect. The circumstances attending the "contact" will dictate whether a "seizure" within the meaning of the fourth amendment has occurred.

In *United States v. Mendenhall*,⁵⁰ Sylvia Mendenhall was identified as a potential narcotics trafficker by federal agents at the Detroit Metropolitan Airport as she disembarked from a flight from Los Angeles. Her behavior fit the "drug courier profile." The agents approached Mendenhall as she walked through the concourse and identified themselves as

federal agents. They asked for identification and her airline ticket. After examining these documents and asking a few questions about discrepancies between the name on her drivers license and airline ticket (she was travelling under an assumed name), the agents returned the documents to her. One of the agents then specifically identified himself as a narcotics agent. Although Mendenhall became nervous, she agreed to accompany the agents to a Drug Enforcement Agency (DEA) office some fifty feet away. Once in the DEA office, she consented to a search and, during the course of the search, she produced two bags of heroin from her undergarments.⁵¹ On these facts, Justice Stewart was joined by Justice Rehnquist in saying there was no seizure under the fourth amendment. The three other Justices who concurred in the plurality decision said there was a seizure, but that it was properly based on reasonable suspicion. Justice Stewart found that "nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversations in the concourse and proceed on her way."⁵² Stewart noted that the events took place in a public concourse; that the agents wore no uniforms and displayed no weapons; that the agents did not summon her, but approached her and identified themselves; and that they did not demand, but requested to see her identification and airline ticket.⁵³ With regard to the agents' request to accompany them to the DEA office, Stewart agreed with the lower court that she went "voluntarily in a spirit of apparent cooperation."⁵⁴

Mendenhall was a plurality opinion and, for that reason, it must be regarded with some caution. Indeed, in *Florida v. Royer*,⁵⁵ an airport detention case with facts similar to *Mendenhall*, the Court found that the restraint on liberty approached the conditions common to an arrest and could only be supported by probable cause. Even though *Mendenhall* may have been shaken, standards developed in that opinion have emerged as accepted law. Specifically, the standard announced by Justice Stewart for determining whether a fourth amendment liberty interest has been implicated was subsequently adopted by a majority of the Court. That standard is whether, "in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave."⁵⁶

The per curiam opinion in *Florida v. Rodriguez*⁵⁷ illustrates the type of law enforcement activity that implicates no fourth amendment interests. Officer McGee of the Dade County Public Safety Department noticed Rodriguez and two companions at the National Airlines ticket counter at the Miami airport. Based upon their suspicious actions, McGee followed them up an escalator. Finally, he identified himself as a policeman and asked Rodriguez if they might talk. The responses to questions by Rodriguez and his companions were inconsistent and irregular. Finally, Officer

⁴⁸ *Terry*, 392 U.S. at 16.

⁴⁹ See *Royer*, 460 U.S. at 493 n.2; *Mendenhall*, 446 U.S. at 547 n.1.

⁵⁰ 446 U.S. 544 (1980).

⁵¹ *Id.* at 547-49.

⁵² *Id.* at 555.

⁵³ *Id.*

⁵⁴ *Id.* at 557 (quoting *Sibron v. New York*, 392 U.S. 40, 63 (1968)).

⁵⁵ 460 U.S. 491 (1983).

⁵⁶ *Id.* at 502 (quoting *Mendenhall*, 446 U.S. at 554).

⁵⁷ 469 U.S. 1 (1984).

McGee asked for permission to search a bag Rodriguez was carrying. Rodriguez gave permission and Officer McGee found cocaine.

The Supreme Court held that the initial contact with Rodriguez, wherein he was simply asked to step aside and answer a few questions, "was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."⁵⁸ The Court went on to say that even if the encounter developed into a seizure for fourth amendment purposes, the detention for questioning would be reviewed under the lesser standard announced in *Terry*, namely, reasonable suspicion.

The military counterpart to the "airport stop" cases are the "bahnhof stop" cases.⁵⁹ These Army cases arose from a Criminal Investigation Division (CID) surveillance operation at the main train station in Mainz, West Germany. CID agents believed that Frankfurt was a major source of drugs for American soldiers stationed at Mainz. Accordingly, they established a surveillance operation and made "citizen contact" with persons getting off the Frankfurt train who looked like they were American soldiers. Their efforts intensified around payday. During the "citizen contact" the agent would typically identify himself, explain his purpose in making the stop, ask for identification, and ask for any information the person may have concerning criminal activity.⁶⁰ Two of the "bahnhof stop" cases specifically addressed the issue of whether these stops constituted a seizure. In *United States v. Foster*,⁶¹ the court found there had been a seizure; in *United States v. Robinson*,⁶² the court found there had been no seizure. The two cases are very similar factually, except that in *Robinson*, the agent returned the suspect's military identification card after examining it.⁶³ In *Foster*, the agent kept the card.⁶⁴

The biggest differences in the cases, however, is that in *Foster*, the court focused on the fact that the agent who stopped Foster subjectively suspected him of committing a crime. The court found nothing wrong with stopping a person to ask him questions as a "concerned citizen," but found that it made a difference when the police stopped someone they believed to be engaged in criminal activity.⁶⁵ In *Robinson*, the court did not dwell on whether the agent subjectively believed that the suspect before him had committed a crime. *Robinson* represents the better view. The subjective intent of the police officer should simply not be

relevant to the question of whether the individual reasonably believes he is not free to leave, except to the extent that the police officer's belief is objectively manifested.⁶⁶

From the "airport stop" cases and the "bahnhof stop" cases, several points can be made about controlled surveillance operations. First, no "seizure" occurs when a law enforcement officer simply approaches an individual in a public place and asks him if he will answer a few questions. Moreover, no seizure results from asking an individual for identification, an airline ticket, or, presumably, a train ticket. What the police officer does with the identification or ticket may, however, be a pivotal issue; failure to promptly return these documents is evidence of a seizure. Another factor to consider is how the officer identifies himself. Merely identifying oneself as a police officer probably is not a sufficient "show of force or authority"⁶⁷ to result in a seizure. On the other hand, identifying oneself as a federal narcotics agent and telling the person he is suspected of narcotics trafficking may be a sufficient show of force. Other factors mentioned in the military cases include whether the agent was in civilian clothes or uniform,⁶⁸ whether there was any physical touching,⁶⁹ whether a weapon was shown,⁷⁰ and whether the agent used abusive language.⁷¹ Additional factors specifically mentioned in *Medenhall* include "the threatening display of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."⁷²

Police Contacts with a Captive Audience

Another context, similar to surveillance operations, in which fourth amendment privacy interests are implicated, is the practice of exploiting conveniently gathered, captive audiences. In *INS v. Delgado*,⁷³ INS agents conducted three "factory surveys," the purpose of which was to discover illegal aliens. During the surveys, agents positioned themselves near the buildings' exits while other agents walked around the factory asking for identification and asking questions of employees at their work stations. The agents wore badges, carried walkie-talkies, and were armed. The questioning was very brief; only one or two questions were asked. During the course of the survey, which lasted from one to two hours, the employees were free to move about the factory. The employees and their union filed for

⁵⁸ *Id.* at 5-6.

⁵⁹ The "bahnhof stop" cases are *United States v. Robinson*, 16 M.J. 526 (A.C.M.R. 1983); *United States v. Foster*, 11 M.J. 530 (A.C.M.R. 1981); and *United States v. Thomas*, 10 M.J. 687 (A.C.M.R. 1981).

⁶⁰ *Robinson*, 16 M.J. at 526; *Foster*, 11 M.J. at 531.

⁶¹ 11 M.J. 530 (A.C.M.R. 1981).

⁶² 16 M.J. 526 (A.C.M.R. 1983).

⁶³ 16 M.J. at 526.

⁶⁴ 11 M.J. at 533.

⁶⁵ *Id.* at 532.

⁶⁶ See *United States v. Sanford*, 12 M.J. 170 (C.M.A. 1981).

⁶⁷ *Terry*, 392 U.S. at 19 n.16.

⁶⁸ *Robinson*, 16 M.J. at 527.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² 446 U.S. at 555.

⁷³ 466 U.S. 210 (1984).

injunctive and declaratory relief contending that this conduct constituted a seizure of the individual employees as well as a collective seizure of the entire work force in violation of the fourth amendment.

The issue framed with regard to the employees individually was whether asking a few questions and requesting identification constituted a "seizure" within the meaning of the fourth amendment. Relying on several earlier cases, including *Royer* and *Mendenhall*, the Court found that this brief, consensual encounter implicated no fourth amendment liberty interests.

A separate issue was whether the entire work force had been "seized." The respondents claimed that the stationing of guards at the exits created an intimidating psychological environment that would lead a reasonable worker to believe that he was not free to leave.⁷⁴ The Supreme Court rejected this contention. The employees' freedom to leave was not restricted by the action of law enforcement officials, "but by the workers' voluntary obligation to their employers."⁷⁵ The Court noted that the workers were free to move about the factory during the survey. The obvious purpose of the INS agents' presence at the exits, the Court concluded, was to ensure that all persons in the factory were questioned⁷⁶ and the brief contact necessitated by the questioning did not constitute a seizure.⁷⁷

In the military context, the *Delgado* rationale may be cited as justification for holding a formation for a criminal investigatory purpose, such as identification. The restraint on a service member's freedom to leave such a formation would be the result of his obligation to command authority, not the result of police misconduct.⁷⁸ It should be noted that one court⁷⁹ has found that holding a formation in an attempt to identify a suspect is not a seizure under the fourth amendment, but not for the same reasons suggested by *Delgado*.

In conclusion, if a law enforcement officer's conduct is restricted to asking a few questions, there has been no seizure of the person and the fourth amendment's protections are not triggered. That is to say, the contact does not have to be predicated on probable cause or even reasonable suspicion. These limited contacts often result in the discovery of additional evidence that gives the law enforcement official the requisite degree of suspicion to initiate more intrusive investigatory procedures that results in the discovery of additional evidence. The contact may be even more productive; it may result in an admission or consent to conduct a search.

⁷⁴ *Id.* at 216.

⁷⁵ *Id.* at 217.

⁷⁶ *Id.* at 218.

⁷⁷ *Id.*

⁷⁸ See *infra* text accompanying notes 119-53.

⁷⁹ *United States v. Kittle*, 49 C.M.R. 225 (A.F.C.M.R. 1974); see also *United States v. Hardison*, 17 M.J. 701 (N.M.C.M.R. 1983) (court approved, sub silentio, use of formation for purposes of identification.)

⁸⁰ 460 U.S. 491 (1983)

⁸¹ See *supra* text accompanying notes 50-54.

⁸² 460 U.S. at 494.

⁸³ *Id.* at 493-94.

Drawing the Line Between Minimally Intrusive Detentions and Searches That Require Only Reasonable Suspicion, and Those Searches and Seizures That Require Probable Cause

If law enforcement officials have reasonable suspicion that a crime has been, is about to be, or is being committed, they may initiate a minimally intrusive search or detention to confirm or dispel their suspicions. Of course, if the minimally intrusive search or detention goes too far, the law enforcement official's conduct becomes a search or seizure that must be supported by probable cause. In recent years, the Supreme Court has had several occasions to define the fine line separating searches and seizures that may be based on reasonable suspicion and those that must be supported by probable cause.

In *Florida v. Royer*,⁸⁰ a plurality decision, the Supreme Court reviewed another "drug courier profile" case. The Court's decision illustrates the fine line between a permissible *Terry* stop and a full-fledged restriction on liberty that must be supported by probable cause. The facts in *Royer* are similar to those in *Mendenhall*,⁸¹ but the Court reached a significantly different result.

Mark Royer was identified as fitting the "drug courier profile" by two Dade County narcotics detectives as he prepared to embark upon a flight from Miami International Airport to LaGuardia in New York. The detectives approached Royer and asked if they could speak with him. Although Royer appeared nervous, he agreed. The detectives asked for identification and his airline ticket. The agents did not return either the identification or the tickets. During the conversation, the detectives informed Royer that they suspected him of transporting narcotics. Then they asked him to accompany them to a room later described as a "large storage closet"⁸² some forty feet away. Once in the room, the detectives used Royer's baggage check stubs to retrieve his luggage. They asked for consent to search his suitcases at which time Royer produced a key and opened the luggage. The detectives found drugs.⁸³ The detention of Royer lasted about fifteen minutes.

Compare these facts with those in *Mendenhall*. A plurality in *Mendenhall* concluded that the law enforcement official's interaction with Sylvia Mendenhall in the concourse of Detroit Metropolitan Airport was so nonintrusive that no fourth amendment privacy or liberty interests were implicated. In *Royer*, six Justices—in three separate opinions—agreed that Royer had been "seized" within the meaning of the fourth amendment, and that the seizure was so intrusive that it could be justified only by a showing of probable cause.

The plurality opinion, authored by Justice White, noted several factors that differentiated *Royer* from *Mendenhall*.

While finding nothing wrong with asking for and examining Royer's airline ticket and drivers license, the fact that the detectives "identified themselves as narcotics agents, told Royer he was suspected of transporting narcotics, and asked him to accompany them to a police room, while retaining his ticket and driver's license without indicating in any way that he was free to depart,"⁸⁴ effectively resulted in a seizure.

In dissent, Justice Rehnquist contended that nothing in the record demonstrated that Royer's resistance was overborne. Royer, who was then a fourth year student at Ithica College and had since graduated with a degree in communications, "simply continued to cooperate with the detectives as he had done from the beginning of the encounter."⁸⁵

Length of Detention and Law Enforcement Diligence

Since *Mendenhall* and *Royer*, the Court has decided several other cases addressing the fine line between a properly limited *Terry* search or detention, and a search or seizure requiring probable cause. Instead of focusing on the length of the detentions, the Court began to focus more on the diligence of the law enforcement officials. The police should act promptly to confirm or dispel their suspicions.

In *United States v. Place*,⁸⁶ the Court indicated that the length of the detention alone may render a *Terry* stop unreasonable. *Place* represented the beginning of a shift in the Court's focus, however. The Court declined an invitation to establish a "bright line" time limit for *Terry* stops, such as the twenty-minute limit suggested by the American Law Institute.⁸⁷ Instead, the Court focused on the circumstances surrounding the detention.

Raymond Place was temporarily detained at Miami International Airport because he met the "drug courier" profile. Because his flight was about to leave and his luggage had already been checked, the Miami police decided not to examine it. After Place left, however, they relayed their suspicions to DEA agents at LaGuardia. Upon arrival at LaGuardia, Place was detained. After he refused to consent to a search of his luggage, the DEA agents took it to Kennedy Airport to be "sniffed" by a drug detection dog. It took some ninety minutes before the "sniff test" was completed. The dog reacted positively and the luggage was seized pursuant to probable cause.⁸⁸ The Supreme Court held that the ninety-minute detention of Place's luggage was unreasonable.

In later explaining the *Place* decision, the Court suggested that the length of the delay standing alone was not the reason that the detention was unreasonable. The Court said that the rationale underlying its decision in *Place* was that the police knew of Place's arrival time at LaGuardia several hours beforehand, and could easily have arranged to have a drug dog at LaGuardia and avoided the ninety-minute delay.⁸⁹ Thus, the failure of the police to employ an investigatory measure that would have resulted in a lesser intrusion of fourth amendment liberty interests was the primary reason that the detention was found unreasonable.

A much longer delay was found reasonable in *Michigan v. Summers*.⁹⁰ Detroit police officers had a valid search warrant for a house they later learned was owned by George Summers. Summers was leaving the house as police officers arrived. Summers was detained and asked for assistance in entering the house. He remained in detention until the search was completed. During the course of the search, the police discovered evidence that resulted in Summers' arrest. Narcotics were found on his person during a search incident to the arrest.⁹¹ While the record before the Court did not indicate how long Summers was detained, it may have been several hours.⁹² In finding the detention reasonable, the Court focused on two points. First, the fact that the search of the house was based on a valid search warrant seemed to "sanitize" Summers' lengthy detention; a neutral and detached magistrate had properly authorized a substantial invasion of Summers' fourth amendment right to privacy and that seemed to minimize the additional intrusion occasioned by making Summers' remain on the premises during the search.⁹³ Second, the fact that Summers was in his own house tended to minimize the intrusive nature of the detention; Summers was not subjected to the stigma associated with a detention in public.⁹⁴

In *United States v. Sharpe*,⁹⁵ a twenty-minute delay was found reasonable. Agent Cooke of the DEA was conducting a surveillance operation for suspected drug trafficking on a coastal road in North Carolina. Early one morning he noticed a heavily loaded pickup with a camper shell and a Pontiac driving in tandem. Cooke followed the vehicles for about twenty miles then decided to make an "investigatory stop." He radioed the South Carolina Highway Patrol⁹⁶ for assistance. Almost immediately, a patrol car caught up with the procession. Soon after the patrol car caught up, the pickup and Pontiac turned off the main road, drove through a campground at a high rate of speed, and then turned back on the main road. Once back on the

⁸⁴ *Id.* at 501.

⁸⁵ *Id.* at 532 (Rehnquist, J., dissenting).

⁸⁶ 462 U.S. 696 (1983).

⁸⁷ Model Code of Pre-Arrest Procedure § 110.2(1) (1975) (cited in *Place*, 462 U.S. at 709 n.10).

⁸⁸ 462 U.S. at 698-99.

⁸⁹ *Sharpe*, 470 U.S. at 684-85.

⁹⁰ 452 U.S. 692 (1981).

⁹¹ *Id.* at 693.

⁹² Justice Stewart noted that while the record did not disclose the length of the detention, a search of a one bedroom apartment in *Harris v. United States*, 331 U.S. 145 (1947), consumed five hours. 452 U.S. at 711 n.3 (Stewart, J., dissenting).

⁹³ 452 U.S. at 701.

⁹⁴ *Id.* at 702.

⁹⁵ 470 U.S. 675 (1985).

⁹⁶ Agent Cooke had followed the suspects across the state line. *Id.* at 677.

main highway, the patrol car flashed on its lights. The Pontiac stopped, but the pickup kept going. Agent Cooke stopped with the Pontiac, which was driven by Sharpe, while the patrol car proceeded after the pickup. The patrol car finally stopped the pickup about one-half mile down the road. The pickup was driven by a codefendant, Savage. The patrolman who stopped Savage did nothing but detain him until Cooke arrived and subsequently conducted a search of the pickup based upon his recognition of the odor of marijuana coming from inside the camper shell. He found forty-three bales of marijuana.⁹⁷

Although twenty minutes lapsed from the time the patrolman detained Savage to the time Cooke arrived and searched the truck, the Court found that most of that time was attributable to the evasive action taken by Savage. For their part, the police pursued an "investigatory means that was likely to conform or dispel their suspicions quickly."⁹⁸

The permissible length of a detention, then, is more a function of circumstances attending the investigation than the number of ticks off the clock. Thus, in *United States v. Hensley*,⁹⁹ the Court said it was reasonable to detain a person based upon a "wanted flyer" long enough to check to see whether an arrest warrant had been issued.¹⁰⁰ In contrast, the Court in *Florida v. Royer* found a detention of fifteen minutes was too long where the suspect had his flight ticket taken and was escorted into a "large storage closet."¹⁰¹

In *United States v. Montoya De Hernandez*,¹⁰² the Court upheld a detention in excess of twenty-four hours based solely on reasonable suspicion. Rosa Elvira Montoya De Hernandez arrived in Los Angeles on a flight from Bogota, Columbia, shortly after midnight on March 25, 1983. The travel arrangements of Mrs. De Hernandez raised the suspicion of Customs agents. Mrs. De Hernandez had made at least eight trips to the United States in the recent past, she spoke no English, she said she had no friends or relatives in the United States, she had no hotel reservations, and she had about \$5,000 in cash. She claimed that she intended to ride around Los Angeles in a taxicab and buy goods for her husband's store in Bogota. Upon conducting a pat-down frisk, Customs agents discovered that her abdomen seemed full and tight. Based on these circumstances, Customs agents believed she was a "balloon swallower."¹⁰³

After De Hernandez declined to submit to an x-ray, Customs agents decided to detain her until she produced a monitored bowel movement. De Hernandez refused food

and drink and, after approximately twenty-four hours, she still had not had a bowel movement. At that point, Customs called a federal magistrate. After placing the Customs agent under oath and listening to his explanation, the magistrate issued an order permitting an x-ray. During a physical examination before the x-ray session, a physician observed an object protruding from De Hernandez's rectum. He removed the object, which was a balloon filled with cocaine. At that point, some twenty-seven hours after De Hernandez was initially detained, she was placed under arrest. Over the next four days De Hernandez passed eighty-eight balloons containing 528 grams of high grade cocaine.¹⁰⁴

The Court upheld the detention as "reasonable." First, the Court determined that the level of suspicion required to detain an individual suspected of smuggling drugs in the alimentary canal was "reasonable suspicion."¹⁰⁵ With regard to the length of the detention, the Court examined the diligence of the law enforcement agents as well as De Hernandez' resistance. The Court noted that "alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief Terry-type stops."¹⁰⁶ Here, the officers could have expected that, after disembarking from a ten hour flight, De Hernandez would produce a bowel movement without delay. It was De Hernandez' "visible efforts to resist the call of nature, which the court below labeled 'heroic,'"¹⁰⁷ that frustrated the Customs agents' expectation.

Balancing the nature and extent of the detention in this case against the fourth amendment privacy and liberty interests of De Hernandez, the Court upheld the detention while noting that the "Fourth Amendment balance between the interests of the Government and the privacy right of the individual is struck much more favorably to the Government at the border."¹⁰⁸

The military cases that have considered the permissible length of the detention have likewise focused on the reason for the delay. In *United States v. Glaze*,¹⁰⁹ the court found it reasonable to detain a soldier at a guard post long enough for the guard to make a telephonic check to confirm or dispel the guard's suspicion that the suspect was violating pass privileges. In *United States v. Davis*,¹¹⁰ the court upheld a one-hour detention of a suspect who was ordered by his commander to remain in the unit area while the commander attended a commander's call and attempted to find out

⁹⁷ *Id.* at 688.

⁹⁸ *Id.* at 686.

⁹⁹ 469 U.S. 221 (1985).

¹⁰⁰ *Id.* at 232.

¹⁰¹ 460 U.S. 491, 494 (1983).

¹⁰² 473 U.S. 531 (1985).

¹⁰³ *Id.* at 532-34.

¹⁰⁴ *Id.* at 534-36.

¹⁰⁵ *Id.* at 540-41. The Court declined to sanction a new standard for seizures at the border. The lower court had employed a "clear indication" standard which, in degree of probability, is greater than reasonable suspicion, but less than probable cause.

¹⁰⁶ *Id.* at 543.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 540.

¹⁰⁹ 11 M.J. 176 (C.M.A. 1981).

¹¹⁰ 2 M.J. 1005 (A.C.M.R. 1976).

whether he had sufficient evidence against the suspect to conduct a search of his room.

The permissive length of a *Terry* stop will depend on the particular facts of the case. Clearly, however, the Supreme Court expects law enforcement agencies to proceed with their investigation in a manner that will most expeditiously either confirm or dispel their suspicions.

Police Station Investigations

The nature of the detention in a *Terry* stop must be as minimally intrusive of the suspect's fourth amendment rights as the circumstances of the particular event permit. Again, the reasonableness of the detention will depend upon the specific facts in each case. Nevertheless, the Supreme Court has been especially reluctant to permit police to take suspects to the station house for investigatory purposes based only on reasonable suspicion. In *Dunaway v. New York*¹¹¹ and again in *Hayes v. Florida*¹¹² the Court condemned the practice of taking a suspect involuntarily to the police station for an investigatory purpose in the absence of probable cause or judicial authorization.

In *Dunaway*, police picked up the suspect at a neighbor's house and took him to the police station for questioning based upon an informant's tip that he was involved in a murder.¹¹³ While acknowledging that the police lacked probable cause to apprehend Dunaway and that he had been "seized" under the fourth amendment, the government argued that it was reasonable under the *Terry* doctrine to seize and question Dunaway based upon reasonable suspicion so long as the questioning was for "a reasonable and brief period of time under carefully controlled conditions."¹¹⁴ The Supreme Court reversed and stated emphatically that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the fourth amendment as necessarily to trigger the traditional safeguards against illegal arrest."¹¹⁵

In 1985, the *Dunaway* issue was again before the Supreme Court in *Hayes v. Florida*.¹¹⁶ Hayes was involuntarily taken to the police station to obtain record fingerprints without probable cause or a warrant. The fingerprints matched latent prints lifted from the bedroom of the victim of a burglary-rape. Hayes contended that transporting him to the police station constituted a seizure for which probable cause was required. The state contended that, unlike *Dunaway*, in which the suspect was interrogated, the evidence sought from Hayes constituted a much less serious intrusion of fourth amendment interests. The state argued that *Terry v. Ohio* should be extended to permit brief detentions for such an innocuous procedure as taking

fingerprints. Relying on *Davis v. Mississippi*,¹¹⁷ the Court found that transporting Hayes to the police station for even a brief investigatory purpose constituted a transgression against the suspect's freedom of movement and privacy that could only be supported by probable cause.

The type of investigative procedures condemned in *Dunaway* are frequently employed by military criminal investigative agencies; it is routine procedure for military police agencies to ask commanders to make service members available at their offices for questioning either as suspects or as witnesses. Ordinarily, commanders order service members to report to the police agency's office, and often provide transportation. Moreover, commanders conducting investigations often simply order witnesses and subjects of an investigation to report for questioning. If *Dunaway* was applied literally, these common military law enforcement procedures would in all likelihood be deemed unreasonable under the fourth amendment.

The military cases that have addressed the *Dunaway* issue have focused on whether the *Dunaway* rule should apply or not apply, or apply in some modified way because of the unique nature of the military.

Arguably, a soldier is conditioned to and in fact expects his superiors to exercise dominating control over his every movement. Such conditions on one's freedom of liberty have no parallel in the civilian context. Based upon the regimen and reality of military life, a soldier has neither a subjective (actual) expectation of privacy nor an expectation of freedom of liberty that society would recognize as reasonable.¹¹⁸ Hence, an order to report—for whatever purpose—is not a "seizure" within the meaning of the fourth amendment; of course, if there is no "seizure," no fourth amendment rights are implicated and *Dunaway* does not apply.

Several courts of review have addressed this issue and, in one fashion or another, have placed limitations of the applicability of *Dunaway* in the military. The Court of Military Appeals, however, has yet to fully address the issue.

In *United States v. Sanford*,¹¹⁹ the Court of Military Appeals considered whether a commander had effectively "seized" Sergeant Sanford by ordering him to report to the commander for questioning. The order for Sanford to report was conveyed by a sergeant first class who simply told Sanford "Lieutenant Young wants to see you."¹²⁰ Even though the commander wanted to question Sanford about a suspected drug transaction, no hint was given to Sanford that the order to report was for the purpose of conducting a criminal investigation. The court found that, in light of the realities of military life, Sanford "could not reasonably conclude that [an order to report to his commander]

¹¹¹ 442 U.S. 200 (1979).

¹¹² 470 U.S. 811 (1985).

¹¹³ 442 U.S. at 203.

¹¹⁴ *Id.* at 206 (quoting 61 App. Div. 2d 299, 302, 402 N.Y.S.2d 490, 492 (1978), which in turn was quoting *People v. Morales*, 42 N.Y.2d 129, 135, 366 N.E.2d 248, 251 (1977)).

¹¹⁵ *Id.* at 216.

¹¹⁶ 470 U.S. 811 (1979).

¹¹⁷ 394 U.S. 721 (1969).

¹¹⁸ *United States v. Katz*, 389 U.S. 347 (1971) (Harlan, J., concurring).

¹¹⁹ 12 M.J. 170 (C.M.A. 1981).

¹²⁰ *Id.* at 172.

constituted a seizure for law enforcement purposes."¹²¹ Thus, in the absence of a "reasonable belief that he was not free to leave"¹²² as a result of a criminal investigation, Sanford was not "seized" within the meaning of the fourth amendment.

The *Sanford* decision is suspect. As discussed later in this article,¹²³ the order for Sanford to report to his commander probably should not be considered a seizure within the meaning of the fourth amendment even though the restriction on Sanford's liberty was for the purpose of a criminal investigation. The troublesome aspect of the *Sanford* decision is not with the result the court reached, but the course it took to reach that result. First, the court leaves some important questions unanswered. The court based its decision on the finding that Sanford subjectively did not know he was under apprehension when he was first told to report to his commander. But as soon as Sanford entered the commander's office, he was told he was under apprehension.¹²⁴ Being told that he was under apprehension clearly placed Sanford on notice that he was not free to leave, yet the court agreed that this "apprehension" was not supported by probable cause. The court failed to explain how or if the continued restriction on Sanford's liberty could be justified after he was made aware that he was being held for law enforcement purposes. Second, the court's decision to focus on the suspect's subjective state of mind in determining whether there was a seizure offers an unworkable and undesirable standard. It is unworkable because it requires courts to determine whether an individual thought the restriction on liberty was for law enforcement purposes as opposed to some valid military purpose. It is undesirable because it suggests that the way to avoid triggering *Dunaway* is to be deceptive; trick the suspect by not explaining that there is a law enforcement purpose. Finally, it is undesirable because it fails to confront the critical issue in *Dunaway*; namely, the actual physical removal of a suspect to the police station for an investigatory purpose. Any military adaptation of the *Dunaway* rule should focus on the actual restriction on individual liberty, not on the individual's understanding of the reason for the restriction.

Assuming *Sanford* remains good law, it only applies to the somewhat limited situation where a suspect is directed to report to his commander without any reason to believe the "detention" is for a law enforcement purpose. The

much more common situation of a service member being told to report to a military law enforcement office for questioning was left unresolved by the Court of Military Appeals. The Navy-Marine Corps court addressed this issue head-on in *United States v. Scott*.¹²⁵

In *Scott*, Naval Investigative Service (NIS) agents were investigating the murder of a sailor at the U.S. Naval Station, Guam. The U.S.S. *Kinkaid* was under repair at the Naval Station, and NIS agents wanted to question several members of the ship's crew. NIS contacted the commander of the *Kinkaid* and asked that a number of sailors be made available for questioning. The commander appointed a gunner's mate first class as the point of contact for obtaining witnesses, and detailed a security guard to transport the sailors to the NIS office. Although Scott and a sailor named Price¹²⁶ were suspected by NIS, neither of them was identified as a suspect to the command. During his interview with NIS agents, Scott agreed to let them search his locker. Agents found a pair of bloody pants during the search and Scott subsequently confessed to the murder.¹²⁷

On these facts, the court found that Scott had been "seized" within the meaning of the fourth amendment. The court went on to hold, however, that because of the differences between military and civilian law enforcement practices, *Dunaway* did not apply to the military.¹²⁸ Six months later, the Court of Military Appeals stated in dicta in *United States v. Schneider*¹²⁹ that *Dunaway* did apply to the military. The court acknowledged that the differences in military and civilian practice prevented the literal application of *Dunaway* to the military. The court concluded, however, that the military "was not free to ignore the decisions of the Supreme Court, but must, instead, attempt to fit them into the context of military society."¹³⁰ Scott was remanded to the Navy-Marine Corps court for reconsideration in light of *Schneider*.¹³¹

Scott was again before the Court of Military Appeals in 1987.¹³² The court's resolution of the case will be discussed later.¹³³

Since the *Schneider* decision, the Navy-Marine Corps court has reconsidered Scott and decided *United States v. Price*,¹³⁴ *United States v. Hardison*,¹³⁵ and *United States v. Fagan*,¹³⁶ all of which address the *Dunaway* issue. The Army Court of Military Review has directly addressed the

¹²¹ *Id.* at 173-74.

¹²² *Mendenhall*, 446 U.S. at 554.

¹²³ See *infra* text accompanying notes 133-149.

¹²⁴ 12 M.J. at 172.

¹²⁵ 13 M.J. 874 (N.M.C.M.R. 1983), *reconsidered*, 17 M.J. 724 (N.M.C.M.R. 1983), *aff'd*, 22 M.J. 297 (C.M.A. 1986).

¹²⁶ Price is reported at 15 M.J. 628 (N.M.C.M.R. 1983).

¹²⁷ The facts were more fully recounted on reconsideration. See *Scott*, 17 M.J. at 725-26.

¹²⁸ 13 M.J. at 876.

¹²⁹ 14 M.J. 189 (C.M.A. 1982).

¹³⁰ *Id.* at 193.

¹³¹ *Scott*, 17 M.J. at 724.

¹³² 22 M.J. 297 (C.M.A. 1986).

¹³³ See *infra* text accompanying note 154.

¹³⁴ 15 M.J. 628 (N.M.C.M.R. 1982).

¹³⁵ 17 M.J. 701 (N.M.C.M.R. 1983).

¹³⁶ 24 M.J. 865 (N.M.C.M.R. 1987).

issue in *United States v. Thomas*.¹³⁷ In all of these cases, the accuseds were required to report to a law enforcement agency office for questioning. The courts in *Price*, *Hardison*, and *Thomas* concluded that the order by a commander to report to a specified place, to include a police agency, was not a "seizure" under the fourth amendment. The limitation on a service member's freedom implicit in such an order is a limitation imposed by a commander's inherent authority over his subordinates, not by the police.¹³⁸

In *United States v. Fagan*,¹³⁹ the Navy-Marine Corps Court of Military Review took a different approach to the *Dunaway* question. In *Davis v. Mississippi*,¹⁴⁰ *Dunaway*, and *Hayes*, the Court had invited the government to seek administrative warrants to conduct station house investigations. The Court said:

We also do not abandon the suggestion in *Davis* and *Dunaway* that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting. We do not, of course, have such a case before us. We do note, however, that some States, in reliance of the suggestion in *Davis*, have enacted procedures for judicially authorized seizures for the purposes of fingerprinting.¹⁴¹

In *Fagan*, the court characterized the commander's intervention as the type of judicial intervention envisioned in *Hayes* and *Davis*. By his involvement in the process, the commander "guarded the appellant from oppressive governmental action"¹⁴² that may be associated with a unilateral law enforcement investigation. The rationale of *Fagan* is persuasive. Left unanswered by the court was whether a quasi-judicial authorization would permit police to engage in other types of station house investigatory procedures, or whether *Fagan* is limited to fingerprinting.

While several courts of review have approved the act of ordering an individual to report to the police station, they have scrutinized the treatment of the individual once he is delivered to the police agency. Bearing in mind that the detention is based only on a reasonable suspicion, the courts will disapprove of treatment that is more akin to a custodial arrest which constitutes a seizure requiring probable

cause.¹⁴³ Several factors may be considered in determining whether the police conduct results in a seizure. The court will consider whether the suspect was treated any differently than other witnesses being interviewed;¹⁴⁴ whether there were bars on the window of the police agency's office;¹⁴⁵ whether the suspect was under guard or merely accompanied by an escort;¹⁴⁶ and whether the suspect's initial contact with police authorities was accompanied by a rights warning that advised the suspect he did not have to answer any question and, by implication, was free to leave.¹⁴⁷ Other relevant factors may include whether the suspect was asked if he wanted to take his own car to the police agency's office;¹⁴⁸ whether the suspect was frisked or handcuffed;¹⁴⁹ and, whether he was left unattended while awaiting his interview.¹⁵⁰

The general application of *Dunaway* to the military context by the Army and Navy-Marine Corps Courts of Military Review in *Thomas* and *Hardison* is well-reasoned and finds support, by analogy, in the Supreme Court's decision in *I.N.S. v. Delgado*.¹⁵¹ Just as the limitation on freedom during the factory surveys in *Delgado* was found to be a function of an employee's obligation to his employer, and not a function of police activity, the limitation on a service member's freedom occasioned by an order to report to a police agency is a function of the service member's obligation to obey his superior's orders.

Indeed, in the military context, the Court of Military Appeals has recognized one of the facts of military life is that a soldier has a lesser expectation of privacy vis-a-vis his commander than he may have vis-a-vis law enforcement officials.¹⁵² As the court noted, the relationship between a commander and his subordinate "imposes a much greater degree of responsibility—in both directions—than is true of most civilian analogs."¹⁵³

Nevertheless, the Court of Military Appeals has yet to squarely address the *Dunaway* issue. Most recently in its reconsideration of *Scott*,¹⁵⁴ the court, without commenting on the lower courts' decisions in *Hardison* or *Thomas*, reiterated that *Dunaway* applies in the military. The Court of Military Appeals, upon reexamination of the facts, went on to conclude that *Scott*'s detention was supported by probable cause. Until the Court of Military Appeals specifically

¹³⁷ 21 M.J. 928 (A.C.M.R. 1986).

¹³⁸ This generalization of the gist of *Price*, *Hardison*, and *Thomas* is the author's, not the courts'.

¹³⁹ 24 M.J. 865 (N.M.C.M.R. 1987).

¹⁴⁰ 394 U.S. 721 (1969).

¹⁴¹ *Hayes*, 470 U.S. at 817.

¹⁴² 24 M.J. at 868.

¹⁴³ *Hardison*, 17 M.J. at 705.

¹⁴⁴ *Scott*, 17 M.J. at 725; *Price*, 15 M.J. at 632.

¹⁴⁵ *Scott*, 17 M.J. at 725; *Price*, 15 M.J. at 631.

¹⁴⁶ *Scott*, 17 M.J. at 725; *Price*, 15 M.J. at 631.

¹⁴⁷ *Scott*, 17 M.J. at 725; *Price*, 15 M.J. at 632.

¹⁴⁸ *United States v. Spencer*, 11 M.J. 539, 540 (A.C.M.R. 1981).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*; *United States v. Varraso*, 15 M.J. 793, 795 (A.C.M.R. 1983).

¹⁵¹ 463 U.S. 1032 (1983).

¹⁵² *United States v. Muniz*, 23 M.J. 201, 206 (C.M.A. 1987).

¹⁵³ *Id.*

¹⁵⁴ 24 M.J. 297 (C.M.A. 1986).

addresses the issue, the application of *Dunaway* remains an unresolved issue in military practice.

Conclusion

Recent developments in the law relating to "contacts" and "Terry stops" are truly "laws for lawyers." The courts' decisions are not characterized by "bright line" rules that

law enforcement personnel can apply mechanically; to the contrary, the courts' decisions have turned on rather subtle factual variations. Thus, *Terry* issues present practitioners with a challenge. Counsel must marshal the evidence as best they can, and weave the evidence, and the inferences drawn therefrom, into the body of law that is emerging.

USALSA Report

United States Army Legal Services Agency

The Advocate for Military Defense Counsel

DAD Notes

What's in a Name?

Trial defense counsel who improperly label their post-trial submissions on behalf of an accused as matters submitted pursuant to Rule for Courts-Martial 1106 rather than 1105 may preclude subsequent relief for the accused on appeal.¹ Rule for Courts-Martial 1106(d)(4) requires the staff judge advocate (SJA) to state whether corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105. The failure of the SJA to comment on legal errors raised in post-trial submissions in accordance with R.C.M. 1105 has been held to require a new recommendation and action.²

When those matters contemplated by R.C.M. 1105 are raised, they are generally raised by the defense counsel on behalf of the accused and not personally by the accused. Defense counsel are frequently labelling their post-trial matters as submissions in accordance with R.C.M. 1106, however. This problem is most notable when defense counsel raise issues like sufficiency of the evidence.

If trial defense counsel fails to label post-trial submissions properly, the SJA may not be compelled to address any legal issue that is raised therein. Furthermore, appellate courts may hold that the matters were submitted in accordance with R.C.M. 1106 and that no response by the SJA was required. The appellate courts' denial will be supported by the fact that trial defense counsel's intent was apparent,

as demonstrated by the label placed on the post-trial submission.

Defense counsel may be doing their clients a disservice by not presenting legal issues in such a way that require SJAs to address and evaluate them for the convening authority. If matters are properly styled and legal issues are raised, the SJA must comment on the issues; if not, the SJA may be forced to do so only at the direction of the appellate courts. Therefore, trial defense counsel who submit post-trial matters that raise legal errors or go beyond addressing matters in the SJA's post-trial recommendation should clearly indicate that those submissions are to be considered to be on behalf of the accused pursuant to R.C.M. 1105. Captain Donna L. Wilkins.

Ex Parte Proceedings by a Magistrate Reviewing Pretrial Confinement

The pretrial confinement review procedure of military magistrates³ has recently been the subject of a case at the Army Court of Military Review. On 24 November 1987, in *United States v. Bell*,⁴ the court held that "ex parte proceedings by the magistrate in reviewing pretrial confinement are not prohibited by the Manual for Courts-Martial."⁵

The Army-wide Military Magistrate Program is the vehicle for reviewing an accused's pretrial confinement by a neutral and detached officer.⁶ It is the magistrate's "neutral

¹ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1106(f)(4) [hereinafter R.C.M.] provides that "[c]ounsel for the accused may submit, in writing, corrections or rebuttal to any matter in the recommendation [of the staff judge advocate] believed to be erroneous, inadequate, or misleading." The accused (or counsel for the accused) may submit matters that may affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. These matters may include "allegations of errors affecting the legality of the findings or sentence." R.C.M. 1105(b)(1).

² See *United States v. James*, 24 M.J. 397 (C.M.A. 1987) (summary disposition); *United States v. Silva*, 23 M.J. 264 (C.M.A. 1986) (summary disposition); *United States v. McDaniel*, ACMR 8601388 (A.C.M.R. 30 Oct. 1987). In some instances, the error has been tested for prejudice to an accused, and where none has occurred, no relief has been granted. See, e.g., *United States v. Ghigliev*, ACMR 8700712 (A.C.M.R. 30 Nov. 1987).

³ R.C.M. 305. See also Dep't of Army, Reg. No. 27-10, Legal Services—Military Justice, ch. 9 (1 July 1984).

⁴ ACMR 8601119 (A.C.M.R. 24 Nov. 1987).

⁵ *Id.*, slip op. at 5.

⁶ AR 27-10, paragraph 9-1. R.C.M. 305(i)(2) requires that a review "be made by a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned." See generally R.C.M. 305 analysis.

and detached" status and the procedures used by the magistrate of which the trial defense counsel must be vigilant.

During the review of Private Bell's pretrial confinement, the magistrate adjourned the hearing. The magistrate then held a discussion with trial counsel and Private Bell's commander, while defense counsel waited outside the office. Apparently, the magistrate obtained information during that ex parte discussion that he later used as a basis for continuing the confinement. The Army Court of Military Review reasoned that the magistrate had not departed from his neutral and detached status merely because a portion of the confinement review proceeding was ex parte. In essence, the court found no prejudice to the accused. The court was satisfied that Private Bell had received due process of law as his trial defense counsel conceded at trial that the defense had been allowed an opportunity to respond to the new information obtained by the magistrate.

In *United States v. Malia*,⁷ the Court of Military Appeals held that the magistrate erred when he considered new evidence, which he discovered through ex parte communication with the command, and failed to give the accused or his counsel an opportunity to respond. The court reasoned that:

[M]inimum standards of fairness in the military justice system dictate that after counsel has been appointed to represent the accused, any consideration that can change the status of the accused necessarily be characterized as adversary. Moreover, an ex parte communication on behalf of the command should not be tolerated by a magistrate in making "a fair and reliable determination" without the presence of the accused or his attorney if so represented at that time.⁸

In attempting to reconcile the two courts' holdings, trial defense counsel should note the apparently key distinguishing fact: the accused or his counsel must be given an opportunity to respond to any new information gained by the magistrate through ex parte actions. In *Malia*, defense counsel was given no such opportunity, and thus the ex parte communication was offensive to the Court of Military Appeals. Conversely, in *Bell*, the Army court viewed trial defense counsel's admission that the magistrate had provided an opportunity to respond as being a significant factor.

⁷ 6 M.J. 65 (C.M.A. 1978).

⁸ *Id.*, at 68 (footnotes omitted). Since *Malia*, R.C.M. 305(e) and (f) have required that the confinee be advised of his right to counsel and be provided counsel for representation during pretrial confinement proceedings. Although these Manual provisions did not change military practice, the incorporation of them in the Manual, for the purpose of protecting a pretrial confinee's interest in pretrial confinement determinations, fortifies the *Malia* rationale. In fact, "[t]he assignment of counsel at this stage is of central importance to ensuring the fairness of the pretrial confinement process." R.C.M. 305(f) analysis. See also Dep't of Army, Pamphlet No. 27-173, Legal Services—Trial Procedure, para. 8-6k n.107 (15 Feb. 1987).

Reading *Malia* in conjunction with R.C.M. 305(e) and (f), the magistrate risks losing his neutral and detached status (thereby violating R.C.M. 305) when he holds a proceeding without allowing defense counsel to be present at such a "centrally important" time. Despite the drafters' contemplation that the pretrial confinement review would be a "limited proceeding [where] an adversary hearing is not required" (R.C.M. 305(i) analysis), *Malia* still requires "minimum standards of fairness," and thereby prohibits purely ex parte communications. The trial defense counsel can find support for the "minimum standards of fairness" in various sources. See generally Dep't of Army, Pamphlet 27-26, Legal Services—Rules of Professional Conduct for Lawyers, Rule 3.3 comment (31 Dec. 1987) [hereinafter Army Rules] ("The . . . magistrate . . . has an affirmative responsibility to accord the absent party just consideration."); Army Rules, Rule 3.8 comment ("A trial counsel . . . is responsible to see that the accused is accorded procedural justice . . ."); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986) ("By its very nature, an ex parte proceeding may provide undue advantage to one party."); *D'Aquisto v. Washington*, 640 F. Supp. 594, 621 (N.D. Ill. 1986) ("An ex parte communication is a communication about a case which an adversary makes to the decisionmaker without notice to an affected party. It offends due process because without notice of it the party cannot respond to it.").

⁹ R.C.M. 305(j)(1)(A) (the military judge may review the magistrate's decision to continue pretrial confinement for abuse of discretion).

¹⁰ Wilkins, *Mistake of Fact: A Defense to Rape*, *The Army Lawyer*, Dec. 1987, at 24.

¹¹ ACMR 8600330 (A.C.M.R. 30 Nov. 1987).

¹² These events gave rise to four specifications of adultery to which the accused pled guilty.

¹³ *Johnson*, slip op. at 6.

Trial defense counsel should discuss the *Bell* holding with their magistrate. The topic of discussion should be a request not to read *Bell* too broadly. It is still clear that a magistrate cannot conduct himself in a way to lose his neutral and detached status, and the best procedure is not to have ex parte communications unless the defense or the government waives its opportunity to be present. Because the magistrate's review is not subject to de novo review,⁹ it is also best if both sides are present. Captain Brian D. DiGiacomo.

She Said No But Her Eyes Said Yes

The existence of "mistake of fact" as a defense to rape, recently discussed in *The Army Lawyer*,¹⁰ has received renewed emphasis in the recent case of *United States v. Johnson*.¹¹

Johnson was found guilty of the rape and indecent assault of a fellow serviceman's wife with whom he had had several prior consensual sexual encounters.¹² At trial, the accused maintained that he knew the prosecutrix so well that her statements of "no" and "we shouldn't do this" were in fact a part of a fantasy she was fulfilling, and that he interpreted her statements, as a part of the fantasy, to actually mean "yes." The trial defense counsel did not request an instruction on the defense of mistake of fact, and only the standard instruction on force and consent was given. The Army Court of Military Review held that the military judge erred by failing to sua sponte instruct the members on the affirmative defense of mistake of fact, and set aside the findings of guilty on the offenses of rape and indecent assault.

On appeal, the government predictably asserted that the military judge's standard instruction on force and consent adequately covered the mistake of fact defense. In the alternative, the government urged that the error was waived because trial defense counsel failed to request the mistake of fact instruction. In rejecting the government's position, the court found that the standard instruction on force and consent simply "does not address the appellant's subjective beliefs with regard to the prosecutrix's actions as to whether her manifested physical acts and oral statements were or could be honestly perceived as consenting to sexual intercourse."¹³

On the issue of waiver, the court found that the requirement for the instruction on mistake of fact arises from the evidence in the case and not from the actions of the trial defense counsel. Because the mistake of fact defense was raised by evidence presented by *both* the defense and the prosecution in *Johnson*, the sua sponte instruction was required.

Trial defense counsel should heed the advice of Captain Wilkins and seriously consider raising the defense of "mistake rape" if raised by some evidence at trial. Captain Jeffrey J. Fleming.

Alibi Instructions

The Court of Military Appeals has recently given clear guidance to military judges regarding the duty to give court members requested instructions regarding possible defenses. In doing so, the court has given defense counsel a powerful tool to ensure that requested special instructions are given by the military judge.

In *United States v. Brooks*,¹⁴ the court held that the military judge erred in failing to give a requested instruction on alibi. Brooks was in charge of a detail of female trainees at the Fort Dix gymnasium. The government alleged that he attempted to have sexual contacts with two of the female trainees at that time in violation of a post regulation. Brooks admitted that he was at the gymnasium at the time the offenses were alleged to have occurred, but maintained that he was in the front of the gymnasium and therefore unable to have committed the offense at the rear of the gymnasium. The defense requested that the members be instructed on the alibi defense, but the military judge refused because all witnesses, including Brooks, placed the accused at the scene of the offense—the gymnasium.

The Court of Military Appeals held that the military judge erred in denying the instruction on alibi. The accused's admission that he was in the gymnasium did not preclude the defense of alibi. "Even if the government evidence shows that a crime has occurred in one room of a two-room building, the defense of alibi would be raised if there is evidence that the accused was always in the other room."¹⁵ The evidence need not account for the entire period of time in question to raise the issue of alibi.¹⁶

The Court of Military Appeals stressed that the military judge must ordinarily instruct on an issue raised at trial if requested to do so.¹⁷ A matter is at issue when some evidence, without regard to its source or credibility, has been placed before the members. The court explained that where

an accused presents, but fails to prove an alibi defense, a danger exists that such will be taken by the members as a sign of guilt. Therefore, the military judge must specifically instruct on alibi. A general instruction regarding burdens of proof is insufficient.¹⁸

Failure to give requested alibi instructions had been held to constitute sixth amendment and due process violations in federal cases, and required reversal unless the error was deemed harmless beyond reasonable doubt.¹⁹ The Court of Military Appeals concluded that even if a more lenient standard of review was applied, the facts in *Brooks* precluded a finding of harmless error.

Military defense counsel should be aware of the military judge's duty to give requested instructions. Counsel should also ensure that the requested instructions are made part of the record of trial for appellate review.²⁰ Captain William J. Kilgallin.

United States v. Jensen: A New Look at Mil. R. Evid. 412

The Court of Military Appeals recently held that evidence of a coaccused's prior consensual sexual relations with the prosecutrix was admissible in the accused's trial for rape where the government's theory of prosecution was that the accused and two coaccuseds sequentially raped the prosecutrix and the defense theory was consent. Writing for the court in *United States v. Jensen*,²¹ Chief Judge Everett opined that Military Rule of Evidence 412 does not exclude such evidence.²²

At trial, the government claimed that the prosecutrix had been raped first by one of the coaccuseds, then by the accused, and finally by the second coaccused.²³ Before the alleged rapes had occurred, the prosecutrix had been dancing in a Korean bar with the first coaccused and had grabbed his penis.²⁴ This coaccused testified that he interpreted this gesture as an implied invitation and that he and the prosecutrix engaged in consensual sexual intercourse in a nearby alley. The defense offered evidence through this first coaccused that on two previous occasions, the prosecutrix had engaged in voluntary intercourse with him and another soldier. The military judge refused to admit this testimony.²⁵

In his decision, Chief Judge Everett held that the prosecutrix's consent to intercourse in the alley with the first coaccused was relevant to show that she had consented with the accused immediately thereafter. In addition, he held that consent to intercourse with the first coaccused

¹⁴ 25 M.J. 175 (C.M.A. 1987).

¹⁵ *Id.* at 179.

¹⁶ See *United States v. Jones*, 7 M.J. 441, 443 (C.M.A. 1979).

¹⁷ See R.C.M. 920(c) discussion.

¹⁸ *Brooks*, 25 M.J. at 178.

¹⁹ *United States v. Webster*, 769 F.2d 487 (8th Cir. 1985); *United States v. Hicks*, 748 F.2d 854 (4th Cir. 1984).

²⁰ The Court of Military Appeals noted the failure of the parties to include the requested instruction as an appellate exhibit. The court inferred that the instruction corresponded to paragraph 5-13, DA Pam. 27-9, Military Judges' Benchbook (1 May 1982). 25 M.J. at 177 n.4.

²¹ 25 M.J. 284 (C.M.A. 1987).

²² *Id.* at 287.

²³ *Id.* at 286.

²⁴ *Id.* at 287.

²⁵ *Id.*

would also support appellant's mistake of fact defense—that appellant reasonably believed that the prosecutrix had consented to intercourse with him.

Chief Judge Everett noted that Mil. R. Evid. 412 permits evidence of prior sexual acts whenever it is "constitutionally required."²⁶ The touchstone for this determination is whether the evidence is relevant. He then turned to Mil. R. Evid. 412(b)(2)(B) to support his conclusion that evidence of the prosecutrix's past sexual history with the coaccused was relevant. Rule 412(b)(2)(B) provides that a prosecutrix's "past sexual behavior with the accused" is relevant to show consent. Identical reasoning indicates that past sexual behavior with a coaccused is relevant to prove consensual intercourse with the coaccused. In *Jensen*, the prosecutrix's consent to intercourse with the coaccused was a material issue, as it rebutted the government's theory of the case. The prosecutrix's past acts that tended to show such consent were therefore relevant.

²⁶ *Id.* at 286 (citing *United States v. Dorsey*, 16 M.J. 1, 5 (C.M.A. 1983)).

As a result of the *Jensen* decision, defense counsel should closely scrutinize rape cases involving more than one accused to discover whether the alleged victim has engaged in consensual sexual intercourse with one or more of the accused on prior occasions. If the government's theory is that the accuseds all engaged in forcible sexual intercourse and one of the coaccused is willing to testify about the prior consensual intercourse, defense counsel should offer such evidence to support an argument of consent and mistake of fact. Defense counsel should argue that such evidence is both relevant and admissible under Rule 412(b)(1). The decision suggests that the accused does not need to be aware of the prior consensual intercourse as long as the evidence is relevant to disprove the government's theory that all of the accuseds had engaged in forcible sexual intercourse. Captain Stephanie C. Spahn.

Trial Judiciary Note

Stipulations of Fact and the Military Judge

Colonel Herbert J. Green

Military Judge, First Judicial Circuit, Fort Knox, Kentucky

Introduction

The scope of the military judge's responsibilities with respect to the guilty plea providence inquiry has constantly expanded. In *United States v. Chancellor*,¹ the Court of Military Appeals recommended that the inquiry include "a delineation of the elements of the offense and an express admission of factual guilt on the record."² Three years later, the court required that, in every inquiry, the military judge explain to the accused the elements of each offense and secure from him a factual rendition of what he did and did not do.³ In addition, the military judge was required to personally advise the accused that the guilty plea waives the right against self-incrimination, a trial of the facts, and the right of confrontation.⁴

In *United States v. Green*,⁵ the court directed military judges to ensure that every provision of a pretrial agreement was set out in the record and that the accused

understood every provision including the sentence limitations. The Manual for Courts-Martial codified these responsibilities.⁶

Most pretrial agreements require that the accused enter into a stipulation of fact concerning the offenses that are the subject of the agreement.⁷ The military judge must "satisfy himself that the accused understands the nature of the stipulation, its effect and that the accused assents thereto."⁸ The Manual states that ordinarily the military judge should ensure that the accused understands the stipulation, the right to not stipulate, and that he consents to it.⁹

The purpose of this article is to determine the state of the law with respect to the authority of the military judge to deal with inadmissible matters in the stipulation of fact and to suggest what the law should be.

¹ 16 C.M.A. 297, 36 C.M.R. 453 (C.M.A. 1966).

² *Id.* at 300, 36 C.M.R. at 456.

³ *United States v. Care*, 18 C.M.A. 545, 551, 40 C.M.R. 247, 253 (C.M.A. 1969).

⁴ *Id.*

⁵ 1 M.J. 453 (C.M.A. 1976).

⁶ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910 [hereinafter R.C.M.].

⁷ See *United States v. Terrell*, 7 M.J. 511, 512 (A.C.M.R. 1979) (Fulton, J., concurring in result). Such a requirement is lawful. *United States v. Thomas*, 6 M.J. 573 (A.C.M.R. 1978).

⁸ *Thomas*, 6 M.J. at 576.

⁹ R.C.M. 811(c) discussion.

Case Law

At least three different views have emerged from appellate decisions with respect to the authority of the military judge to deal with inadmissible evidence contained in the stipulation of fact.

One of these views comes from *United States v. Rasberry*¹⁰ and *United States v. Taylor*.¹¹ In *Rasberry*, the accused pleaded guilty to absence without leave and entered into a pretrial agreement that required a stipulation of fact. The stipulation incorporated statements made by the accused to fellow soldiers¹² that indicated the accused wanted out of the Army. The defense moved to excise these statements from the stipulation, claiming that they had been obtained in violation of the accused's Article 31¹³ rights. The military judge refused to litigate the motion, denied the requested relief, and informed the accused that he could either plead guilty and comply with the pretrial agreement or it would be cancelled. The accused then pleaded guilty and received the benefit of his pretrial agreement.¹⁴

The Army Court of Military Review affirmed, but its rationale was not clear. The court opined that in return for a pretrial agreement the accused could be made to stipulate to aggravating circumstances. It stated that in this case the accused merely forfeited an Article 31 claim and was not compelled to agree to a forbidden condition.¹⁵ Also, the accused benefited from a "highly favorable"¹⁶ pretrial agreement in a simple case to prosecute. Lastly, the court implied that probably no Article 31 violation had occurred.

The net effect of the affirmance was that a judge need not entertain motions to redact stipulations of fact. The court, however, masked this effect by the substantive matters it considered in its opinion. Nevertheless, in *Taylor*, a panel, which included two of the three judges who concurred in *Rasberry*, was convinced that *Rasberry* declared that a military judge should not entertain such motions.¹⁷

Taylor was a drug case. The accused pleaded guilty pursuant to a pretrial agreement and entered into a stipulation of fact that incorporated, by reference, a sworn statement made by the accused.¹⁸ The defense objected to the stipulation and statement. The military judge heard argument, ruled that the stipulation was proper, and redacted certain portions of the statement. On appeal, the accused claimed

that the documents admitted at the trial were prejudicial because they contained "uncharged misconduct and exaggerated facts."¹⁹

The court found it necessary to comment on the propriety of litigating motions to redact stipulations. It opined that the proper place to consider the contents of stipulations is in counsel's office prior to trial. The military judge is not an arbiter in pretrial negotiations and by entertaining such motions, he improperly inserts himself into such negotiations. The court declared that the military judge's role with respect to contents of stipulations is to assure fundamental fairness and prevent plain error. Beyond that, he should grant a recess to allow the parties to come to an accommodation. If they cannot, he should sustain any defense objection, advise the accused that he has not complied with the pretrial agreement, and that the convening authority is no longer bound by it.

Essentially, *Rasberry* and *Taylor* declare a hands off policy for the military judge. The contents of stipulations are generally not the judge's concern. Rather, it is the concern of the accused, counsel, the staff judge advocate, and the convening authority.

A second approach, in differing forms, is manifested in *United States v. Glazier*²⁰ and *United States v. Mullens*.²¹ Pursuant to a pretrial agreement, Glazier pleaded guilty to wrongful use of marijuana and wrongful appropriation of a motor vehicle. At trial, he moved to redact certain aggravating matters from the stipulation of fact.²² The military judge ruled that the aggravating matters were relevant to the offenses²³ and denied the motion. The accused then withdrew his objection to the stipulation. On appeal, he claimed that the military judge erred in admitting the evidence. The Army Court of Military Review disagreed and affirmed.

After satisfying itself that the ruling in the trial court was correct, the court found it necessary, in light of *Taylor*, to discuss the role of the military judge when motions to redact stipulations of fact are raised. The court declared that *Taylor* unnecessarily restricts the military judge in the handling of evidence. It stated that if the military judge refused to rule when such a motion is made, it would be "an abrogation of his responsibility to insure cases are fairly decided

¹⁰ 21 M.J. 656 (A.C.M.R. 1985), petition denied, 22 M.J. 378 (C.M.A. 1986).

¹¹ *United States v. Taylor*, 21 M.J. 1016 (A.C.M.R. 1986).

¹² At some time these soldiers "had leadership responsibility over appellant in their capacity as squad leader or assistant squad leader." *Rasberry*, 21 M.J. at 657. See generally *United States v. Jones*, 24 M.J. 367 (C.M.A. 1987); *United States v. Duga*, 10 M.J. 206 (C.M.A. 1981).

¹³ Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

¹⁴ The accused was sentenced to a bad-conduct discharge, confinement for two months, forfeiture of \$375.00 per month for two months, and reduction to E-1. The convening authority approved the sentence, but suspended all confinement in excess of thirty days for three months.

¹⁵ See generally R.C.M. 705(c).

¹⁶ *Rasberry*, 21 M.J. at 657.

¹⁷ *Taylor*, 21 M.J. at 1017.

¹⁸ It is not unusual to see such statements offered by the government. Often, in drug cases, a pretrial confession details a history of drug trafficking, which certainly is aggravation, but which the prosecution may not be able to prove.

¹⁹ *Taylor*, 21 M.J. at 1016.

²⁰ 24 M.J. 550 (A.C.M.R. 1987).

²¹ 24 M.J. 745 (A.C.M.R. 1987).

²² The stipulation stated that the accused wrongfully appropriated a ¼ ton truck for the purpose of sightseeing. During his sojourn, an accident occurred. A passenger sustained injuries in the accident that led to his death. In addition, before the accident the accused and the passenger had consumed alcoholic beverages. The stipulation also stated that the damages to the vehicle exceeded \$2500.00.

²³ See R.C.M. 1001(b)(4); see also *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982); *United States v. Witt*, 21 M.J. 637 (A.C.M.R. 1985).

upon relevant admissible evidence."²⁴ Moreover, the accused has a right to an evidentiary ruling. A procedure that conditions a pretrial agreement on the acquiescence to the admission of inadmissible evidence is fatally flawed. Once the evidentiary ruling is made, however, the military judge does not redact the stipulation. Rather, the judge permits the parties to decide if they want to go along with the stipulation or come to a compromise.

Thus, under *Glazier*, the defense has the right to make its motion and to obtain a ruling from the military judge on the admissibility of such evidence. The military judge may not enforce the ruling by the usual method of denying admissibility, however. The judge can only tell the parties that the evidence is inadmissible and ask then what they want to do. At that point, the defense can try to bargain further with the prosecution, accede to the stipulation, or withdraw from the agreement. Thus, the defense can win its motion, have the judge rule the evidence is inadmissible, and then be forced to take it or leave it. In the last analysis, the defense has the ability to obtain a ruling that it is right, but it has no right to a judicial remedy.

Mullens follows the basic fact pattern of the previous cases. The accused pleaded guilty²⁵ pursuant to a pretrial agreement and entered into a stipulation of fact. At trial, he moved to exclude uncharged misconduct²⁶ from the stipulation. The military judge did not specifically entertain the motion, but found no fundamental error and no violation of Rule 403.²⁷ The Army court affirmed, but as in *Glazier*, it found it desirable to comment upon the proper role of the military judge when objections to the stipulation of fact are made.

Initially, the court stated that when the defense objects to the stipulation of fact, the objection raises a doubt as to the accused's understanding of the stipulation and it should be rejected. Where there is no objection, the judge should test admissibility as did the trial judge in *Mullens*. If he finds no fundamental error, he should tell the accused that he need not stipulate but if he does not, he probably will violate his pretrial agreement.²⁸ At that point, the accused may decide to go along with the agreement or withdraw.

Mullens differs from *Glazier* in that *Glazier* recognizes that the accused has a right to a ruling on an objection to admissibility. *Mullens* recognizes no such right. *Mullens* accepts that the military judge must test the stipulation for fundamental error and unfair prejudice, however. *Mullens* and *Glazier* are consistent in that they provide no judicial remedy for the accused.

The third approach and the one that recognizes a right to make a motion to redact the stipulation and the right to obtain judicial relief is found in *United States v Sharper*.²⁹ At his trial, Sharper pleaded guilty to various drug offenses pursuant to a pretrial agreement and moved to waive the stipulation of fact requirement or to delete aggravating matters³⁰ set out in the stipulation. The trial judge denied the motion, claiming he did not have the authority to intervene in pretrial agreement negotiations. The accused then adhered to his guilty plea and appealed, claiming as error the trial judge's failure to waive the stipulation of fact requirement.

The Army Court of Military Review affirmed. It found that the trial judge was correct in stating that he could not intervene in pretrial negotiations. The relief sought, however, did not involve such intervention. The military judge, it declared, has the "responsibility to police the terms of pretrial agreements to assure conformity with the law and fundamental fairness."³¹ To do this, "the military judge also has the power to modify by judicial order a pretrial agreement."³² Although the military judge incorrectly characterized his authority, prejudicial error did not occur because the aggravating matter in the stipulation was proper.

In sum, a spectrum of lines of authority has emerged from the case law. *Rasberry* and *Taylor* declare a hands off policy; that except for plain error, the contents of the stipulation of fact is not the business of the trial judge. Under *Glazier* and *Mullens*, the military judge determines the admissibility of challenged evidence set out in the stipulation. With the possible exception of plain error or evidence that denies fundamental fairness, however, the judge cannot enforce this ruling by denying admissibility. *Sharper* provides that the military judge has the authority to decide the admissibility of evidence contained in the stipulation and to enforce this ruling by excluding such evidence.

Rationale and Analysis

A variety of reasons have been advanced by panels of the court of military review for denying the military judge the authority to delete inadmissible evidence contained in stipulations of fact.

The military judge should not engage in pretrial agreement negotiations. Courts have assumed that in-court redactions of inadmissible evidence are pretrial agreement negotiations. The better view, however, is that redaction is not involvement in these negotiations. The military judge does not determine any clause or condition of the agreement. The judge acts neither as a mediator nor as a negotiator. He or she merely determines what evidence is

²⁴ *Glazier*, 24 M.J. at 554.

²⁵ The accused pleaded guilty to drunk driving, sodomy, indecent acts, and communicating a threat.

²⁶ The opinion is silent on the nature of the uncharged misconduct.

²⁷ Mil. R. Evid. 403.

²⁸ Under *Mullens*, it is not clear if the military judge may redact the stipulation if he finds fundamental error or unfair prejudice.

²⁹ 17 M.J. 803 (A.C.M.R. 1984); accord *United States v. Keith*, 17 M.J. 1078, 1080 n.* (A.F.C.M.R. 1984) ("[W]e recommend that trial defense counsel enter into the stipulation of fact, if true, and raise the issue of any inadmissible matters contained therein at trial for resolution by the military judge on the record."). See also *United States v. Smith*, 9 M.J. 537, 538 n.2 (A.C.M.R. 1980).

³⁰ The stipulation stated inter alia that when he was apprehended, the accused possessed a quantity of heroin in individual packets that he intended to distribute, several hundred dollars, and more than 600 Deutsch Marks.

³¹ *United States v Sharper*, 17 M.J. at 805.

³² *Id.*

admissible based on the case law³³ and regulatory authority.³⁴

The military judge has no authority to rule on these issues. To support its holding that absent violations of fundamental fairness the military judge may not redact stipulations of fact, the *Mullens* panel cited the Court of Military Appeals decision in *United States v. Green*.³⁵ There, then-Chief Judge Fletcher stated that where conditions of a pretrial agreement violate appellate case law, public policy, or the judge's notion of fundamental fairness, he should strike such provisions "with the consent of the parties."³⁶

If a provision of the agreement violates the law, it is difficult to understand why the consent of the parties would be needed to strike it. Parties do not decide the law and cannot agree to violate it. Moreover, any provision that renders a judge impotent to correct violations of law without the consent of the parties is at the very least questionable. The better view is that, if a provision of a pretrial agreement violates the law, the military judge has the duty and authority to strike it irrespective of the consent of the parties.

Green was written in the early days of Chief Judge Fletcher's tenure³⁷ and essentially was a first step into the arena of judicial supervision of pretrial agreements.³⁸ Since those words were authored, military appellate courts have written much more boldly and decisively. In *United States v. Lanzer*,³⁹ the court said, "Once a pretrial agreement is made it should not be modified except by judicial order, i.e. the trial judge."⁴⁰ An Army panel subsequently stated "we hold that the military judge should have stricken the provisions [of the pretrial agreement]."⁴¹ One month later, the Court of Military Appeals declared "as indicated in [Lanzer] the military judge has the power to modify by judicial order a pretrial agreement after it has been made."⁴²

The qualified language of Judge Fletcher, cited in *Mullens*, completely disappeared in *United States v. Kazena*.⁴³ He wrote:

[T]his Court has stated before that it is the military judge at a court-martial who is responsible for the immediate supervision of pretrial agreements in the military justice system. . . . In this role, he has the duty to make sure plea-bargain negotiations are conducted in a reasonably fair manner to the accused and that the convening authority intends to perform as promised.⁴⁴

If Judge Fletcher's statement in *Green* that the consent of the parties was necessary to strike illegal and improper pretrial agreement provisions was at one time the law, the foregoing makes it clear that it is no longer the law.⁴⁵ Thus, to the extent that the *Mullens* limitation on the unilateral authority of the trial judge to redact stipulations of fact are based on the language of *Green*, it is without foundation.

Moreover, the early emphasis on the absence of judicial authority to rule on admissibility has to a degree now shifted to modified judicial involvement. Under *Glazier*, and to an extent even under *Mullens*, the judge may rule on admissibility. The judge may not enforce this ruling by denying admissibility, however.

Unilateral action by the military judge would destroy the understanding of the parties. *Mullens* advances the theory that, if the military judge redacts the stipulation of fact, there is no longer a meeting of the minds with respect to the pretrial agreement.

Parties to a criminal trial base their decisions in large part on their appreciation of what evidence they believe is admissible. When they miscalculate, they are rarely afforded the luxury of retracting those decisions.⁴⁶ The prosecution's decision to enter a pretrial agreement based

³³ E.g., *United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982).

³⁴ E.g., R.C.M. 1001(b)(4).

³⁵ 1 M.J. 453 (C.M.A. 1976), cited in *Mullens*, 24 M.J. at 748 n.3.

³⁶ 1 M.J. at 456. Judge Fletcher first announced this position in his concurring opinion in *United States v. Elmore*, 1 M.J. 262 (C.M.A. 1976). He repeated his *Elmore* comments in *Green*.

³⁷ Judge Fletcher was confirmed by the Senate on 14 April 1975 and named Chief Judge on that date. *Green* was published on 13 August 1976. *Elmore*, from which he took his comments in *Green*, was published on 16 January 1976.

³⁸ See generally Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil. L. Rev. 44, 53-94 (1977); Fletcher, *The Continuing Jurisdiction Trial Court*, *The Army Lawyer*, Jan. 1976, at 3.

³⁹ 3 M.J. 60 (C.M.A. 1977).

⁴⁰ *Id.* at 62. The court likened the refusal of the convening authority to suspend a bad-conduct discharge pursuant to a pretrial agreement to an improper modification of a pretrial agreement.

⁴¹ *United States v. Kelley*, 6 M.J. 532, 534 (A.C.M.R. 1978). At issue was a provision of a pretrial agreement relating to the timing of the presentation of motions. A similar provision was condemned 2½ years prior to trial in *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975).

⁴² *United States v. Partin*, 7 M.J. 409 (C.M.A. 1979). At issue was the interpretation of the pretrial agreement by the military judge that went beyond the clearly expressed wording of the pretrial agreement. The court found the judge's interpretation to be erroneous. Chief Judge Fletcher authored the opinion. Judge Perry concurred but dissociated himself from a portion of the opinion unrelated to judicial authority.

⁴³ 11 M.J. 28 (C.M.A. 1981).

⁴⁴ *Id.* at 31. Judge Fletcher was commenting with disfavor on the hesitancy of the military judge to rule on whether a pretrial agreement was binding on the convening authority.

⁴⁵ See also *United States v. Dawson*, 10 M.J. 142, 149 (C.M.A. 1981) (Fletcher, J.) ("Additionally, the supervision of the plea-bargaining process [is] now within the province of the military judge at trial . . ."); *United States v. Elliot*, 10 M.J. 740, 741 (N.C.M.R. 1981) ("Flowing therefrom, the military judge has the power to modify by judicial order a pretrial agreement after it has been made.").

⁴⁶ For example, when the prosecution refuses to enter a pretrial agreement for a plea of guilty to a lesser included offense because of a view of the evidence that turns out to be mistaken and the accused is subsequently acquitted or found guilty of a very minor offense, it has no recourse. Similarly, when an accused pleads guilty because he overestimates the strength of the prosecution's case and a finding of guilty is entered, he may not withdraw the plea when he discovers the error.

on what it believes is admissible evidence on sentencing is merely one of the normal decisions that a party makes when deciding trial strategy. The risk that the decision is a mistake is a normal one and not an extraordinary circumstance. Therefore, there is no basis for permitting what *Mullens* does, i.e., giving the prosecution a second bite at the apple when it is not wise enough to know that certain evidence is inadmissible.⁴⁷

Plead not guilty if you don't like it. *Taylor* and *Mullens* essentially place the accused in a take it or leave it situation.⁴⁸ This is somewhat tempered by a caveat that the courts will not condone plain error or violations of fundamental fairness. If the prosecution wants inadmissible evidence as the price for a pretrial agreement, however, that is permissible. That an accused can be compelled to bear that cost appears incompatible with an enlightened system of justice.⁴⁹

Some matters are clear. The prosecution need not enter a pretrial agreement. American Bar Association standards, however, provide that prosecutors should make known their willingness to enter plea discussions.⁵⁰ Moreover, pretrial agreements, even in times of uncrowded dockets, facilitate convictions of the guilty and permit scarce resources to be applied elsewhere. Finally, when the government acts, it must act fairly.

When the government conditions pretrial agreements on the consent to inadmissible evidence, it is not acting fairly. Therefore, as a matter of equity, it should not be permitted to benefit by such conduct.⁵¹ Moreover, as a matter of law, that part of the agreement is and ought to be severable from other portions of the agreement, and the agreement without the offending material should be enforced.

Unarticulated in the various opinions, but almost surely in the background, is an apprehension that, if the military judge can unilaterally redact stipulations of fact, the judge and not the convening authority will ultimately possess the ability to bind the government to pretrial agreements. Certainly this will not occur by empowering military judges to

redact stipulations. The concern, however, is that this is but the first step, and that succeeding steps will eventually permit the military judge to intrude so greatly into the discretionary military justice responsibilities of the convening authority so as to significantly impair the convening authority's ability to assure good order and discipline. It appears that the courts have drawn a hard and fast line to prevent this perceived inevitable erosion of the power of the convening authority.

A military judge should not exercise the commander's authority under the Uniform Code of Military Justice. Appellate courts should properly be concerned about usurpation of command authority by judges. By acknowledging the unilateral authority of the military judge to redact inadmissible evidence from stipulations of fact, however, the courts would not be sanctioning any usurpation of command authority. Moreover, it would not be placing the military judge in the negotiation process. The acknowledgment would only be a recognition of what the trial judge is trained to do and what the trial judge does more often than anything else, i.e., rule on the admissibility of evidence, and deny admission when evidence is improper.⁵²

Conclusion

The prohibition on the authority of the military judge to redact inadmissible evidence from stipulations of fact is based in large part on the belief that such authority involves the military judge in pretrial agreement negotiations. It does not. The authority would only permit the judge to do what judges have always done; rule on the admissibility of evidence. Because this authority is ruling on the admissibility of evidence and nothing more, the better reasoned opinion is *Sharper*. Accordingly, the accused should have the right to object to inadmissible evidence in the stipulation of fact. The military judge should have the authority to determine admissibility and to redact inadmissible evidence. Finally, when redaction occurs, the government should be bound by the pretrial agreement.

⁴⁷ It should be remembered that the standards for admissibility are not stringent. The prosecution need only show relevancy under R.C.M. 1001. If the evidence is challenged as unfairly prejudicial, it is the opponent of the evidence who must establish that the prejudicial effect substantially outweighs the probative value. Mil. R. Evid. 403. See *United States v. Glazier*, 24 M.J. 550 (A.C.M.R. 1987). Relevancy under R.C.M. 1001 has been given a broad definition. See, e.g., *United States v. Wright*, 21 M.J. 518 (A.C.M.R. 1985); *United States v. Pooler*, 18 M.J. 832 (A.C.M.R. 1984).

⁴⁸ See, e.g., *United States v. Mullens*, 24 M.J. 745, 749, n.6 (A.C.M.R. 1987).

⁴⁹ *Glazier* recognizes that such a procedure is "fatally flawed." 24 M.J. at 554. Nevertheless, it provides no judicial remedy for the accused. In a nation whose courts have an historic duty of protecting even the guilty from the overreaching of government prosecutors, this omission appears inexplicable.

⁵⁰ Standards for Criminal Justice, The Prosecution Function Standard 3-4.1 (1980).

⁵¹ See generally *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987).

⁵² See generally R.C.M. 801.

Unjust Conviction: There Is a Way Out

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Most criminal lawyers are familiar with the axiom that "it is better that ten guilty persons escape than an innocent one suffer."¹ While our criminal justice system is designed to accurately distinguish between guilty and innocent, and punish only the guilty, inasmuch as the system is run by humans there is always the possibility of error. Should an error occur, there is a little-known avenue of relief open to wrongly-convicted individuals, both civilians and soldiers. The United States Code provides that a wrongly-convicted person may petition a court for a certificate of innocence and upon fulfilling all requirements, the court may issue a written declaration of the petitioner's innocence. This note describes the standards and procedures that a petitioner must satisfy under the Unjust Conviction Statute² to be granted a certificate of innocence.

Although the statute, by its terms, makes no provision for courts-martial, a certificate of innocence is available to individuals convicted by courts-martial. The United States Court of Military Appeals has held that the "unjust conviction statute encompassed an unjust conviction by court-martial."³ Similarly, the federal courts have uniformly extended this statute to cover convictions by courts-martial. "Considering the manifestly broad object of the Unjust Conviction Statute, to rectify governmental injustice, we consider it unthinkable that Congress intended to make the statute inapplicable to servicemen who have been unjustly convicted."⁴ The justification for affording such relief to soldiers as well as civilians was most clearly put forth in *McLean v. United States*.⁵ The court acknowledged that

the statute was an attempt by a "fair-minded government" to remedy a convicted person's loss of liberty that occurred through an error on the part of the government. The court stated, "One convicted in a court-martial is just as effectively deprived of his liberty as one convicted in the district court of the United States. The same sovereign is responsible for the wrong that has brought about his suffering."⁶

Recognizing that a certificate of innocence is available to soldiers wrongly convicted at courts-martial, the initial question is where does a soldier go to file a petition. First, military courts are fully empowered to consider and grant certificates of innocence. The United States Court of Military Appeals has expressly authorized the courts of military review to issue certificates of innocence.⁷ In *McMurry v. United States*,⁸ the United States Court of Military Appeals, after reversing a conviction due to insufficient evidence, twice refused to consider the accused's petition for a certificate of innocence and ordered that it be presented to the Navy-Marine Corps Court of Military Review.⁹ It also appears that a petition for a certificate may be presented to a military trial judge.¹⁰

In addition, soldiers convicted at courts-martial are free to petition United States federal courts for a certificate of innocence. Much of the leading federal case law on the Unjust Conviction Statute concerns individuals convicted at courts-martial who have sought to vindicate their innocence in federal courts.¹¹ Moreover, a soldier's petition in federal court does not have to be in conjunction with a petition for

¹ W. Blackstone, Commentaries IV, at 27 (1765-69). Blackstone's famous quotation is actually paraphrased from Voltaire's "It is better to risk saving a guilty person than to condemn an innocent one." F. Voltaire, *Zadig*, ch. 6 (1747).

² 28 U.S.C. § 2513 (1982). The statute provides, in part, that:

(a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offense of which he was convicted, or on new trial or rehearing he was found not guilty of such offense, as appears from the record or certificate of the court setting aside or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offense against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

³ *Forrest v. United States*, 3 M.J. 173, 174 (C.M.A. 1977).

⁴ *Osborn v. United States*, 322 F.2d 835, 839-40 (5th Cir. 1963).

⁵ 73 F. Supp. (W.D.S.C. 1947).

⁶ *Id.* at 779.

⁷ *Forrest*, 3 M.J. at 174. The Army Court of Military Review "was the appropriate forum to issue the certificate within the terms of 28 U.S.C. § 2513." *Id.*

⁸ 15 M.J. 1054 (N.M.C.M.R. 1983).

⁹ *Id.* at 1055.

¹⁰ By implication, the military trial judge also has the authority to grant a certificate of innocence. This route entails a certain amount of risk for the petitioner, however. In *McDaniel v. Stewart*, 7 M.J. 929 (A.C.M.R. 1979), after the accused's first court-martial conviction was set aside for failure to produce a material witness, the accused was acquitted at a second court-martial and the record of trial was forwarded to The Judge Advocate General pursuant to Article 61 of the Uniform Code of Military Justice, 10 U.S.C. § 861 (1982), [hereinafter UCMJ]. The accused then petitioned the military judge for a certificate of innocence, which the military judge denied. In turn, the accused petitioned the Army Court of Military Review for an extraordinary writ, ordering the military judge to grant the certificate. The Army court declined, deciding it lacked jurisdiction because it had no statutory authority to review the record under Article 66, UCMJ, and the request exceeded the limits of the court's extraordinary writ power. 7 M.J. at 930, 931. Accordingly, a petitioner who has been acquitted upon retrial and then petitions the trial judge for a certificate may not be able to seek appellate review of the trial judge's decision.

¹¹ *Osborn*, 322 F.2d at 837, 838; *Roberson v. United States*, 124 F. Supp. 857 (Ct. Cl. 1954); *McLean*, 73 F. Supp. at 776.

habeas corpus.¹² In fact, 28 U.S.C. § 2513 was actually designed as a first step that a petitioner must satisfy in order to prosecute a monetary claim against the United States for wrongful imprisonment.¹³ Accordingly, soldiers may seek a certificate of innocence from either a military court or a federal court.

The Unjust Conviction Statute provides no guidance as to whether or how a judge should conduct a hearing concerning a petition for a certificate of innocence.¹⁴ The decision of a military or federal judge to grant or deny a certificate of innocence is purely discretionary with that judge. The Court of Military Appeals has expressly rejected the argument that appellate courts should conduct a de novo review of a denial of a petition, and instead concluded that "our standard for review must properly be limited to a determination of whether the lower court decision was an abuse of discretion."¹⁵ An appellate court can set aside a lower court's refusal to grant a certificate only where the refusal was "plainly erroneous."¹⁶

Understanding that a petitioner may seek a certificate of innocence in either a military or federal court, the next question is what must the petitioner show to prevail and be granted the certificate. The petitioner must first recognize that common to all waivers of sovereign immunity, the statute will be strictly construed against the petitioner. "It is an act of executive grace, no more,"¹⁷ and it "may not by implication be extended to cases not plainly within its terms."¹⁸ The Court of Military Appeals has held that "such a certificate may be issued only under the precise guidelines set forth in 28 U.S.C. § 2513."¹⁹ In short, to prevail a petitioner must cross all the "t"s and dot all the "i"s.

It is well-established that a petitioner must satisfy three conditions before he is entitled to a certificate of innocence. First, the conviction must have been reversed or set aside on the ground that the petitioner was not guilty.²⁰ Second, the petitioner must not have committed any of the acts

charged, or his acts, deeds, or omissions must not have constituted an offense.²¹ Finally, the petitioner must not have caused or brought about his own prosecution by his own misconduct or neglect.²²

As to the first condition, the petitioner must prove that his conviction was reversed or set aside because he was *actually* not guilty. It is not enough to demonstrate only that he was found not guilty of the crime. Rather, the petitioner must affirmatively prove that he is innocent of the crime. The fact that the petitioner's "guilt was not proven beyond a reasonable doubt is . . . insufficient in itself to qualify petitioner for relief under 28 U.S.C. § 2513. Petitioner must further establish to our satisfaction that he indeed is truly innocent of the offense charged."²³ The Army Court of Military Review has held that "the standard to be followed in issuing a Certificate of Innocence is not failure of proof beyond a reasonable doubt to establish guilt but whether petitioner established that he was 'truly innocent.'"²⁴ While this standard, in effect, reverses the burden of proof and the presumption of innocence against the petitioner, it is well to recall that a petition for a certificate of innocence is a civil action and the initial step to a monetary claim for damages against the government.²⁵ Not surprisingly, almost all petitions for certificates of innocence are denied because of the petitioner's failure to prove his innocence.

Given the high standard that the petitioner must meet, it follows that acquittal on technical grounds is not sufficient to warrant a certificate of innocence. "The claimant cannot be one whose innocence is based on technical or procedural grounds, such as the lack of sufficient evidence or a faulty indictment. . . ."²⁶ Accordingly, in *Osborn v. United States*, even though a court-martial conviction had been set aside for lack of jurisdiction, petitioner was not entitled to a certificate because the evidence indicated that he might have been convicted by a court having proper jurisdiction.²⁷ In *United States v. Brunner*, the petitioner's conviction had been set aside because it was based partially

¹² See *Roberson*, 124 F. Supp. at 861.

¹³ 28 U.S.C. §§ 1495, 2513 (1982).

¹⁴ 28 U.S.C. § 2513 requires the judge to make a determination on the petition for a certificate of innocence and, if granted, the judge must state the reasons, in writing, for granting the petition. The statute is silent, however, as to the conduct of such a process or proceeding. "The statute does not prescribe any procedure to be followed . . . in passing upon the application for certificates of innocence, nor does it indicate whether the proceeding shall be *ex parte* or adversary, apparently leaving to the discretion of the . . . judge the kind of hearing to be held." *Roberson*, 124 F. Supp. at 861 n.4. The absence of procedural rules is somewhat troubling as the petition for a certificate of innocence is a civil law matter, yet the military courts are courts of strictly criminal jurisdiction.

¹⁵ *Forrest*, 3 M.J. at 175; see *McMurray*, 15 M.J. at 1055.

¹⁶ *Forrest*, 3 M.J. at 175.

¹⁷ *Vincin v. United States*, 468 F.2d 930, 933 (Ct. Cl. 1972).

¹⁸ *United States v. Keegan*, 71 F. Supp. 623, 636 (S.D.N.Y. 1947).

¹⁹ *Forrest*, 3 M.J. at 173 n.1.

²⁰ 28 U.S.C. § 2513(a)(1) (1982).

²¹ 28 U.S.C. § 2513(a)(2) (1982).

²² 28 U.S.C. § 2513(a)(2) (1982); see generally *Forrest v. United States*, 2 M.J. 870 (A.C.M.R.), *aff'd* 3 M.J. 173 (C.M.A. 1976).

²³ *McMurray*, 15 M.J. at 1056.

²⁴ *Forrest*, 2 M.J. at 873. The federal courts have adopted the same standard. The petitioner must prove "not only his acquittal by twelve laymen of the jury, but also that the judge himself was convinced of his innocence." *United States v. Rigsbee*, 204 F.2d 70, 72 (D.C. Cir. 1953). "Innocence of the petitioner must be affirmatively established . . ." *United States v. Brunner*, 200 F.2d 276, 280 (6th Cir. 1952).

²⁵ "Had Congress intended to authorize suit for damages . . . by any one who had been [wrongly] convicted and imprisoned . . . it could have done so easily by providing that the only condition precedent to recovery . . . should be a certificate from the . . . court showing conviction, imprisonment, reversal, and acquittal at the second trial." *Rigsbee*, 204 F.2d at 71.

²⁶ *Osborn*, 322 F.2d at 840 (quoting H.R. Rep. No. 2299, 75th Cong., 3rd Sess. 2 (1938)).

²⁷ 322 F.2d at 840.

on evidence protected by the marital privilege. Nevertheless, the petition was denied.²⁸ Similarly, in *Cratty v. United States*,²⁹ a certificate of innocence was denied even though the petitioner's conviction had been set aside because of the statute of limitations.

For the second condition for granting of a certificate of innocence, the petitioner must establish that not only is he "truly innocent" of the crime charged, but he must also be "truly innocent" of any crime related to the one charged. In *United States v. Keegan*, the petitioner had been found not guilty of conspiracy to counsel others to evade the draft and petitioned for a certificate of innocence. The court denied the petition because, while it was clear the petitioner was not guilty of conspiracy, the court was "definitely not satisfied" that he was not guilty of the underlying offense.³⁰ In short, to be successful the petitioner must truly enter the courtroom with "clean hands."³¹

Finally, the petitioner must establish that he did not cause his prosecution by his own misconduct or neglect. Again, courts have strictly construed this provision against petitioners. In *McMurray v. United States*, the petitioner's conviction for possession of heroin was reversed and he petitioned for a certificate of innocence. The Navy court

acknowledged that there was insufficient evidence to prove possession on a given date, but noted that McMurray had permitted someone else to hide the heroin in his room. There was other evidence to suggest that he might have possessed heroin on a different date. The court ultimately did not decide if such conduct was criminal, but concluded that the statute "does not require such misconduct [that which causes his own conviction] to amount to a crime."³² Accordingly, the petition was denied.

A certificate of innocence is not available to a soldier simply because his conviction was set aside or because he was acquitted upon retrial. Rather, to receive a certificate of innocence, a convicted soldier must prove his innocence. It should be the primary goal of counsel, both prosecution and defense, as well as military judges, to ensure that the Unjust Conviction Statute is never needed. In the unfortunate event that a "truly innocent" person is convicted, however, it is somewhat comforting to know that there is a way to undo, as best as humans can, the mistakes humans made.

²⁸ *Brunner*, 200 F.2d at 276.

²⁹ 83 F. Supp. 897 (S.D. Ohio 1949).

³⁰ 71 F. Supp. at 638; see also *Weiss v. United States*, 95 F. Supp. 176 (S.D.N.Y. 1951).

³¹ *Keegan*, 71 F. Supp. at 628.

³² *McMurray*, 15 M.J. at 1056; see also *Weiss*, 95 F. Supp. at 180, where the court denied a petition because, even if the petitioner's misconduct "did not constitute a crime, it would seem to me at least it constituted misconduct which caused or brought about his prosecution."

Trial Defense Service Note

Issues Arising From Staff Judge Advocate Involvement in the Court Member Selection Process

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Introduction

The appellate courts have always been sensitive to the fact that the military justice system is unique in that it subjects citizen-soldiers to trial for life and liberty without certain basic constitutional rights afforded to civilians, i.e., the right to trial by jury, the right to bail, the right to grand jury indictment, etc. Court-martial jurisdiction was conceived out of military necessity and is tolerated in American jurisprudence as an essential compromise between discipline on the one hand and constitutional rights on the other.¹ This delicate balance of interests has inherent risks not present in the civilian justice system.² As

noted by the United States Supreme Court in *United States ex rel. Toth v. Quarles*,³ "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article 3 of our constitution."⁴

This article will address one danger area that is unique to military justice: staff judge advocate (SJA) involvement in the court member selection process. In marked contrast to the civilian system, the SJA, under whose supervision falls the prosecution of criminal cases, performs a variety of

¹ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); Dept. of Army, Pamphlet No. 27-173, *Military Justice—Trial Procedure*, para. 2-1 (15 Feb. 1987). [hereinafter DA Pam 27-173].

² See, e.g., *United States v. Miller*, 19 M.J. 159 (C.M.A. 1985), where the court noted "the realities of military life which create unique problems with respect to perceptions of fairness in criminal trials." *Id.* at 164 (citations omitted).

³ 350 U.S. 11 (1955).

⁴ *Id.* at 22.

functions with respect to court member selection.⁵ Attention will be focused upon the legal issues that result when the SJA office exceeds its proper role in the process. In particular, two problem areas have been recurrent: SJA guidance to the convening authority in violation of Article 25(d)(2), Uniform Code of Military Justice,⁶ and prosecutorial infringement upon the selection process. The purpose of this article is to alert defense counsel to these potential issues and afford a framework for litigation and further research.⁷

Staff Judge Advocate Participation in the Court Member Selection Process

An ultimate end of both the civilian and military justice systems is that those selected as triers of fact be fair and impartial. In the civilian system, this goal is achieved by the random selection of citizen-jurors from the community as a whole. "[T]he Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected" is sacrificed in the military in the interest of military exigency.⁸ Commanders are vested with broad authority to select individuals they deem best suited for court-martial duty.⁹ This potentially dangerous power is checked and a balance struck by the requirements of Article 25(d)(2).¹⁰ The latter provision constrains commanders to personally select soldiers "best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament." Of equal importance is the fact that commanders are not permitted to resort to criteria not stated in the article.¹¹ Good faith adherence to Article 25 is pivotal to maintaining the carefully crafted balance of interests in the sensitive area of court member selection.¹²

It is in this context that the SJA performs various functions with respect to court member selection. The SJA office routinely performs a host of ministerial duties associated with the selection process, i.e., requesting nominees

from subordinate commands, assembling and collating lists of nominees, preparing transmittal documents, notifying the members selected, etc. These routine administrative duties, often performed by the criminal law section, rarely portend an issue at trial. Rather, it is the substantive involvement by members of the SJA office in the selection/recommendation process that provides fertile ground for error.

Even though the SJA office is responsible for criminal prosecution within its jurisdiction, the SJA has long been permitted to participate substantively in the selection process.¹³ For example, the convening authority may properly seek the SJA's opinion on nominees under consideration,¹⁴ and the SJA is permitted to make his or her own personal nominations.¹⁵ The SJA, however, is constrained in this advice and recommendations by the parameters of Article 25(d)(2). It is improper for the SJA to make recommendations based on extraneous considerations.

In *United States v. McClain*,¹⁶ the trial judge found that the SJA, due to his concern with "lenient sentences" in his jurisdiction, advised his convening authority that it had come to his attention that younger, junior officer and enlisted members "were most often the proponents and advocates of these very lenient and unusual sentences." The SJA advised the convening authority that he must make his court member selections based on Article 25 criteria, but that he should consider giving preference to older, more experienced soldiers. The convening authority considered the SJA's advice, ultimately selecting no enlisted soldiers below the grade of E-7 and no junior officers. The Court of Military Appeals found the panel to be improperly constituted as a result of the SJA's advice.

Here, findings made by the military judge make clear that the staff judge advocate intended to exclude junior members because he believed they were more likely to adjudge light sentences. He intended to utilize the statutory criteria set forth in Article 25(d)(2) of the

⁵ A model procedure for SJAs to utilize in the selection of court members is set out in Schwender, *One Potato, Two Potatoes . . . A Method to Select Court Members*, *The Army Lawyer*, May 1984, at 12. This article points out that: "The Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM) provide only very general guidance on the selection of members for court-martial duty. It is left to individual staff judge advocates (SJAs) to create a system . . ." *Id.* (footnotes omitted).

⁶ Uniform Code of Military Justice art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982) [hereinafter UCMJ].

⁷ For an excellent discussion of defense challenges to the court member selection process, see Morgan, "Best Qualified" or Not? *Challenging the Selection of Court-Martial Members*, *The Army Lawyer*, May 1987, at 34.

⁸ *United States v. Kemp*, 46 C.M.R. 152, 154 (C.M.A. 1973). In *Kemp*, the Court of Military Appeals refused to utilize its supervisory powers to impose a system of random court member selection upon the military. The court noted, however: "In so holding, we are not unaware that attractive arguments can be made for a truly random selection method akin to those utilized in civilian courts." *Id.* at 155.

⁹ "Congress recognized that the commander has a legitimate interest in the process of military justice, devolving from command responsibilities, including the duty to maintain good order and discipline within the command." DA Pam 27-173, para. 2-1; see *Curry v. Secretary of the Army*, 595 F.2d 873, 878 (D.C.Cir. 1979) ("Provisions of the UCMJ authorizing the convening authority to select the members of the court-martial also respond to unique military needs.").

¹⁰ Note also the prohibition of command influence in UCMJ art. 37(a). Violations of Article 25 often are deemed to be a violation of Article 37(a) as well. See *United States v. Thomas*, 22 M.J. 388, 397 (C.M.A. 1986), *cert. denied*, 107 S. Ct. 1289 (1987); *United States v. McClain*, 22 M.J. 124, 133 (C.M.A. 1986); *United States v. Carman*, 19 M.J. 932, 937 n.9 (A.C.M.R.), *petition denied*, 21 M.J. 92 (C.M.A. 1985) ("[W]e note that there can be a close relationship between the mandate of Article 25(d)(2) and the admonition of Article 37(a) . . ."). While the treatment accorded violations of these two articles is similar, the rules with respect to Article 37 issues are generally more favorable to the defense. For example, while the doctrine of waiver is not applied in command influence cases (see *United States v. Blaylock*, 15 M.J. 190, 193 (C.M.A. 1983)), it is applicable to Article 25 issues (See *infra* note 54).

¹¹ *United States v. Greene*, 20 C.M.A. 232, 239, 43 C.M.R. 72, 79 (1970).

¹² See *United States v. Daigle*, 1 M.J. 139, 140-41 (C.M.A. 1975) ("Discrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code.").

¹³ *United States v. Marsh*, 21 M.J. 445, 448 (C.M.A.), *cert. denied*, 107 S. Ct. 666 (1986) ("[M]ilitary precedent has allowed the staff judge advocate to make recommendations for selection.").

¹⁴ It is well settled that the convening authority may rely upon his staff for the compilation of a list of court member nominees. *Kemp*, 46 C.M.R. at 155.

¹⁵ *Marsh*, 21 M.J. at 448.

¹⁶ 22 M.J. 124 (C.M.A. 1986).

Code—especially length of service—to obtain court membership that he believed would adjudge heavier sentences. However, the history of that statutory provision makes clear that Congress never intended for the statutory criteria for appointing court members to be manipulated in this way.¹⁷

The lesson of *McClain* is that, just as in the case of a convening authority, the SJA's substantive involvement in the selection process must be scrupulously guided by the spirit and intent of Article 25. As noted by Judge Cox in his opinion concurring in the result, "[t]he only concern the staff judge advocate should have had was fairness."¹⁸

As is apparent from *McClain*, an SJA walks a tightrope through the very sensitive area of court member selection. The SJA office is responsible for the efficient and effective prosecution of criminal cases,¹⁹ yet the SJA's participation in the court member selection process must be completely absent of bias or partiality.²⁰ It is understandable that many SJAs decline any substantive input into the process, albeit permitted by law.²¹ For SJAs that do become involved, there is yet a further trap for the unwary beyond that in *McClain*, that of prosecutorial infringement upon the selection/recommendation process.

Prosecutorial Involvement in the Selection/ Recommendation Process

As previously mentioned, it is routine for the criminal law section to perform a variety of administrative duties related to the selection and empanelment of court members. Problems arise when the prosecution exceeds ministerial participation and substantively influences the process.²²

It is clear that government prosecutors cannot have any substantive involvement in the selection of court members.²³ The Court of Military Appeals reiterated in *United States v. Marsh* that: "We believe it is well-established in military law that the trial counsel, being a partisan advocate, can play no part in the selection of court members."²⁴

The prohibition presumably encompasses all involvement beyond purely ministerial functions.²⁵ For instance, prosecutors should not urge subordinate commanders to nominate certain prospective members, make recommendations to the SJA, cull the lists of nominees routed through the SJA office, choose replacement members, etc.²⁶ Moreover, prosecutors are duty-bound to avoid even the appearance of substantive involvement.²⁷

While the SJA may make recommendations to the convening authority, he or she may not seek the advice of the prosecutors. In *Marsh*, the court noted that "we recognize that substance, rather than form, should be determinative."²⁸ Thus, presumably if an SJA's recommendations to the convening authority have been influenced by the prosecution, an improper selection issue is raised.²⁹

Trial counsel are per se excluded from the selection/recommendation process.³⁰ Others on the SJA staff are excluded only if they fall within the definition of a "partisan advocate."³¹ It would seem that anyone within the criminal law section, including the chief,³² ought to fall within that definition. Those working in the criminal law section are intricately involved in the prosecution function and can hardly be expected to be impartial participants. Nevertheless, except for trial counsel, exclusion depends upon a factual determination of partisanship. Thus, to raise an issue of prosecutorial infringement involving the chief of

¹⁷ *Id.* at 130-31.

¹⁸ *Id.* at 133 (Cox, J., concurring in the result).

¹⁹ DA Pam 27-173, para. 2-2e, describes the SJA's prosecutorial duties as follows: "First, there is the duty of ensuring that the convening authority's cases are prosecuted fairly but vigorously. The second duty is supervising personnel assigned to that office, including trial counsel."

²⁰ Quite simply, the SJA's contrasting roles as chief prosecutor and impartial advisor are accepted by the courts "because the military justice system as established by Congress justifiably permits such a procedure as a matter of due process." *United States v. Hardin*, 7 M.J. 399, 403 n.5 (C.M.A. 1979); see *Marsh*, 21 M.J. at 448.

²¹ As noted by Schwender, *supra* note 5, at 12, procedures vary widely from one SJA office to another.

²² The distinction between a trial counsel's permissible ministerial duties and improper substantive or "meaningful" involvement in the process is discussed in *Marsh*, 21 M.J. at 447-48. See *United States v. Sax*, 19 C.M.R. 826, 836-39 (A.F.C.M.R. 1955) (finding trial counsel's involvement in the selection process to be ministerial).

²³ See *United States v. Beard*, 15 M.J. 768 (A.F.C.M.R. 1983); *United States v. Crumb*, 10 M.J. 520, 527 (A.C.M.R. 1980) (Jones, S.J., concurring), cited with approval in *United States v. Cherry*, 14 M.J. 251, 253 (C.M.A. 1982); *United States v. Cook*, 18 C.M.R. 715 (A.F.C.M.R. 1955) (citing analogous civilian precedent).

²⁴ 21 M.J. at 447 (citations omitted) (emphasis added).

²⁵ As noted in *Marsh*, the trial counsel can have no "meaningful role" in the selection process. 21 M.J. at 448.

²⁶ Morgan, *supra* note 7, at 37, recommends: "During pretrial discovery, counsel should routinely request all documents, memoranda, and directives related to the process. Counsel should find out how members are initially nominated, how the nominees are presented for selection to the convening authority, and how the convening authority is advised regarding selection." Counsel should carefully compare the lists of nominees forwarded to the SJA office by the various commands with the nominees ultimately presented to the convening authority. Counsel must determine who made substitutions and deletions along the way, and upon what basis.

²⁷ *Crumb*, 10 M.J. at 527 ("By involving the Chief Trial Counsel in the 'culling' process and the Trial Counsel in the replacement scheme, however, the authorities needlessly injected an appearance of evil into the procedure that should have been avoided."). See also Dep't of Army, Pamphlet No. 27-26, Military Justice—Rules of Professional Conduct for Lawyers, Rule 8.4(d) (31 Dec. 1987).

²⁸ 21 M.J. at 448.

²⁹ See *Beard*, 15 M.J. at 773 (transmittal of nominations made by assistant trial counsel, who was also chief of criminal law, through the SJA did not attenuate the error); *Cook*, 18 C.M.R. at 719-20.

³⁰ *Marsh*, 21 M.J. at 447.

³¹ *Id.* at 448 ("In the absence of a particular showing of partisan advocacy, we cannot see why the staff judge advocate or a member of his staff, whatever his title, should be per se excluded from making these recommendations.").

³² See *Greene*, 20 C.M.A. at 238, 43 C.M.R. at 78 (finding problems with the major role played by the chief of criminal law in the selection process); *Crumb*, 10 M.J. at 527 (Jones, S.J., concurring).

criminal law, deputy SJA, etc., the defense will have to show that the particular staff member is in fact a partisan advocate who was substantively involved in the selection process.³³

Most often, the errors discussed above are unintentional and not the part of any grand scheme to subvert the process. For instance, a trial counsel might innocently believe that he can make court member recommendations to his SJA, who also is unaware of the prohibition against prosecutorial involvement, and who in turn passes the information on to the convening authority. Defense counsel are well advised to presume that a good faith error has been made in the absence of clear evidence to the contrary, avoiding allegations of unethical or intentional misconduct. Common sense suggests that the less controversy aroused, the more candor that can be expected from the government participants and witnesses.

The Burden of Persuasion

On first impression, it seems arguable that issues pertaining to court member selection are jurisdictional in nature.³⁴ If jurisdictional, once the issue is minimally raised, the burden of persuasion would be on the government.³⁵ Despite some disagreement among the courts of military review,³⁶ the Court of Military Appeals has resolved that improper selection issues are not jurisdictional.³⁷ Therefore, the defense has the burden of persuasion³⁸ and must produce evidence of impropriety in the selection process, i.e., that the SJA gave erroneous guidance to the convening authority or that a partisan advocate substantively participated in the process. The relative paucity of appellate decisions involving improper SJA office involvement confirms what

common sense suggests: it is not easy for the defense to make such a showing.

Of utmost significance is the fact that the defense need only persuade the court that there was some impropriety within the selection process. There is no requirement that the defense demonstrate specific prejudice as a result of the error.³⁹ To the contrary, for the government to successfully defeat the motion, it must demonstrate the absence of prejudice, both specific and general.⁴⁰ In practice, the burden of persuasion shifts to the government once an impropriety has been shown. Defense counsel should make the most of this very beneficial transition, insisting that the trial court look to the government to resolve all questions of prejudice and appearance.

The Standard of Proof

Because a defense motion raising an improper selection issue is nonjurisdictional, the applicable standard of proof would appear to be "by a preponderance of the evidence."⁴¹ The appellate courts have preferred to state the standard in different terms, however. The courts have looked to the defense to present evidence sufficient to overcome the presumption of regularity attaching to court member selection⁴² and to establish a reasonable doubt as to the propriety of the process.

Conversely, for the government to successfully litigate an improper selection issue, both at trial and on appeal, it must persuade the court beyond a reasonable doubt.⁴³ At all levels, reasonable doubt must be resolved in favor of the accused. As previously discussed, it is Article 25 that guarantees a fair and impartial trier of fact. It incorporates into

³³ The language in *Marsh* clearly suggests that anyone within the SJA office, including the SJA, who is shown to be a "partisan advocate" should be excluded from making court member recommendations. 21 M.J. at 448. If the SJA can be shown to act in an "adversarial" or "antagonistic" role, he or she should be excluded from making recommendations. *Cook*, 18 C.M.R. at 720 n.1. Defense counsel should argue that only when the SJA wears a cloak of impartiality is he or she permitted to make recommendations to the convening authority with respect to the selection of court members.

³⁴ Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 201(b) [hereinafter R.C.M.] provides that: "[F]or a court-martial to have jurisdiction . . . (2) The court-martial must be composed in accordance with these rules with respect to number and qualifications of its personnel. As used here 'personnel' includes . . . the members . . ." See R.C.M. 502(a).

³⁵ R.C.M. 905(c)(2)(B).

³⁶ Compare *United States v. Anderson*, 10 M.J. 803, 805 (A.F.C.M.R. 1981) and *United States v. Brown*, 10 M.J. 589 (N.C.M.R. 1980), *aff'd*, 16 M.J. 36 (C.M.A. 1983) with *United States v. Wilson*, 21 M.J. 193, 196-97 (C.M.A. 1986) and *United States v. Tagert*, 11 M.J. 677 (N.C.M.R. 1981), *petition denied*, 13 M.J. 461 (C.M.A. 1982). Earlier authority finding that violations of Article 25 were jurisdictional frequently cited *Runkle v. United States*, 122 U.S. 543 (1887), wherein the Supreme Court stated: "To give effect to its sentences, it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law." *Id.* at 556. Defense counsel may still find it useful to cite and quote this case in argument and on brief.

³⁷ *Marsh*, 21 M.J. at 450 (citing *Wilson*, 21 M.J. at 197); see *Daigle*, 1 M.J. at 141; *United States v. Hashaw*, 3 M.J. 529, 531 (A.F.C.M.R. 1977); *United States v. Jacobsen*, 39 C.M.R. 516, 518 (A.C.M.R. 1967).

³⁸ R.C.M. 905(c)(2)(A); see *United States v. Cunningham*, 21 M.J. 585, 586 (A.C.M.R. 1985), *petition denied*, 22 M.J. 275 (C.M.A. 1986); *Carman*, 19 M.J. at 937 ("The burden of establishing the improper selection of court members rests on the appellant.") (citing *United States v. Townsend*, 12 M.J. 861 (A.F.C.M.R. 1981), *petition denied*, 13 M.J. 389 (C.M.A. 1982)).

³⁹ The shifting of the burden of persuasion in improper selection cases without a showing of specific prejudice is analogous to command influence cases where a violation of Article 37(a) triggers a rebuttable presumption of prejudice. See *United States v. Rosser*, 6 M.J. 267, 272 (C.M.A. 1979); *United States v. Treakle*, 18 M.J. 646, 657 (A.C.M.R. 1984) (en banc), *aff'd*, 23 M.J. 151 (C.M.A. 1986).

⁴⁰ *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

⁴¹ R.C.M. 905(c)(1).

⁴² *McClain*, 22 M.J. at 133 (Cox, J., concurring in the result); *Carman*, 19 M.J. at 936; see *United States v. Cruz*, 20 M.J. 873, 884 (A.C.M.R. 1985) (en banc).

⁴³ *McClain*, 22 M.J. at 132 ("Certainly, in this regard there is reasonable doubt which 'must be resolved in favor of the accused.'"); *Greene*, 20 C.M.A. at 238, 43 C.M.R. at 78 ("Together, these factors raise at least a reasonable doubt . . . Such doubt must be resolved in favor of the accused."); *Sax*, 19 C.M.R. at 838 ("The possibility of partiality in this selection of the court would force us to reversal."). As to the wording of the reasonable doubt standard, note *Chapman v. California*, 386 U.S. 18 (1967):

There is little, if any, difference between our statement in *Fahy v. Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

Id. at 24; see *Thomas*, 22 M.J. at 393-94.

military due process an accused's fifth and sixth amendment rights to fair and impartial trial. Violation of Article 25 potentially deprives an accused of these constitutional rights. While not every issue of constitutional magnitude must be resolved as harmless beyond a reasonable doubt, the Court of Military Appeals has applied that standard to SJA advice in contravention of Article 25(d)(2) and to prosecutorial infringement upon the selection process. Indeed, the court noted in *United States v. Thomas* that the beyond a reasonable doubt standard is justified where an alleged error "involves a corruption of the truth-seeking function of the trial process."⁴⁴ While *Thomas* involved a violation of Article 37(a), UCMJ, violations of Article 25 similarly affect the integrity of truth-seeking process.⁴⁵

The Government Must Dispel the Appearance of Impropriety

A trial must be kept free from substantial doubt with respect to fairness and impartiality. "A judicial system operates effectively only with public confidence—and, naturally, that trust exists only if there also exists a belief that triers of fact act fairly."⁴⁶

It is not enough for the government to demonstrate an absence of specific prejudice in an improper selection case. The Court of Military Appeals and the courts of military review have resorted to an application of general prejudice as a means of avoiding the appearance of impropriety and establishing the confidence of the general public in the fairness of courts-martial proceedings.⁴⁷ Thus, the government has the additional burden of dispelling any appearance problems in a selection case. This can prove difficult and an elusive hurdle for the government, affording the defense its best line of attack.

In *McClain*, the government was able to demonstrate that, despite the SJA's improper advice, the convening authority made his selections in good faith adherence to

Article 25(d)(2).⁴⁸ Moreover, there was no indication that the panel was unfair or specifically prejudicial to the accused. Irrespective, the Court of Military Appeals applied general prejudice.

The military judge found that the convening authority "adhered to the standards of Article 25 in making his selection." This finding, however, is not adequate to purge from the selection process the staff judge advocate's improper purpose of avoiding lenient sentences. In this connection, we note that—because "[d]iscrimination in the selection of court members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code,"—this court is especially concerned to avoid either the appearance or reality of improper selection.⁴⁹

This holding is consistent with long-standing military precedent rooted in the need to assure absolute fairness in a system lacking certain constitutional safeguards that are fundamental to the civilian justice system.⁵⁰

The Remedy at Trial

The appropriate remedy for improper selection issues of the type addressed in this article is a curative reselection.⁵¹ At a minimum, the reselection must replace any member affected by the improper procedure. Indeed, appearances may dictate a total reselection. While dismissal of the charges is not the proper remedy,⁵² should the convening authority fail to take curative action based upon the trial court's ruling, dismissal may then be appropriate.⁵³

Waiver and Remedies on Appeal

Inasmuch as improper selection is not jurisdictional, the doctrine of waiver is applicable.⁵⁴ Therefore, these issues

⁴⁴ 22 M.J. at 393.

⁴⁵ See *United States v. Hedges*, 11 C.M.A. 642, 646-48, 29 C.M.R. 458, 460-62 (1960) (Latimer, J., concurring).

⁴⁶ *United States v. Fowle*, 7 C.M.A. 349, 352, 22 C.M.R. 139, 142 (1956) (citation omitted).

⁴⁷ See, e.g., *United States v. Walsh*, 47 C.M.R. 926, 929 (C.M.A. 1973); *Hedges*, 11 C.M.A. at 645, 29 C.M.R. at 461 (Latimer, J., concurring); *United States v. McConnell*, 1 C.M.A. 508, 4 C.M.R. 100 (1952).

⁴⁸ 22 M.J. at 132.

⁴⁹ *Id.* (citation omitted).

⁵⁰ In *Rosser*, 6 M.J. at 272, the Court of Military Appeals was sharply critical of the military judge's attempt to remedy specific prejudice resulting from a violation of Article 37(a), "without considering the total effect of such conduct on the appearance of fairness." In view of the language in *McClain*, 22 M.J. at 132, it is apparent that the court is similarly concerned with respect to appearances in improper selection cases. Defense counsel should make every effort to assure that the military judge is sensitive to this concern.

⁵¹ A motion for appropriate relief (R.C.M. 906) in improper selection cases can be styled in a variety of ways, i.e., request for the withdrawal of charges and proper reselection, *McClain*, 22 M.J. at 125; request for appropriate relief from being tried until a court is properly constituted, *Greene*, 20 C.M.A. at 235, 43 C.M.R. at 75; a challenge to the selection process, *Daigle*, 1 M.J. at 140; request for a new court panel, *Townsend*, 12 M.J. at 862. R.C.M. 905(a) provides: "A motion shall state the grounds upon which it is made and shall set forth the ruling or relief sought. The substance of the motion, not its form or designation, shall control."

⁵² While not an appropriate remedy, a number of defense counsel have requested dismissal, perhaps for tactical reasons. See, e.g., *Cunningham*, 21 M.J. at 586.

⁵³ As correctly noted by the military judge in *Greene*, 20 C.M.A. at 235, 43 C.M.R. at 75, the convening authority alone can select and appoint court members. UCMJ arts. 22-25; R.C.M. 503(a)(1) and 504(b).

⁵⁴ *Marsh*, 21 M.J. at 450; *Wilson*, 21 M.J. at 197; *Sax*, 19 C.M.R. at 839. This is in sharp contrast to command influence issues which, while not jurisdictional, are nonwaivable. See *United States v. Deachin*, 22 M.J. 611, 613 n.1 (A.C.M.R. 1986). Defense counsel confronted with a waiver problem may attempt to couch the issue as a violation of Article 37(a) as well as Article 25, UCMJ. Indeed, the distinction between Article 37(a) and Article 25 issues is often blurred. See *supra* note 10.

may be knowingly and intelligently waived⁵⁵ and may not be subject to relief on appeal in the absence of plain error.⁵⁶ Defense counsel must assure that defense motions in this area are made in a timely manner.⁵⁷

At least where it is clear on the record that the accused has foregone a particular mode of trial because of an adverse ruling on an improper selection motion, the issue will be preserved on appeal.⁵⁸ Specifically, the selection issue is not waived should the accused elect trial by judge alone or withdraw a request for enlisted members because of an adverse ruling.⁵⁹ Defense counsel are well advised to state on the record that the adverse ruling is the reason for a change in the type of trial.

In cases where an unsuccessful motion was directed at only one improperly selected member, defense counsel must be concerned about the use of the peremptory challenge. To peremptorily challenge the affected court member without stating on the record that the challenge would have been used otherwise but for the court's adverse ruling may waive this issue on appeal.⁶⁰

Because errors in court member selection are not jurisdictional, an accused who has pled guilty is only entitled to a reversal of the sentence should he win the issue on appeal.⁶¹ Should it be apparent from the record that the plea

of guilty was induced by an adverse ruling on a selection issue, however, a full reversal would seem appropriate.⁶² Again, defense counsel should carefully articulate on the record what decisions are the result of an adverse trial court ruling.⁶³ The bottom line is that the appellate remedy for the type of errors addressed in this article is corrective action as to that part of the trial affected, not full reversal. Moreover, dismissal is not the appropriate remedy.⁶⁴

Conclusion

Unless there is complete confidence in the impartiality of a court-martial panel, justice is not served. At the very least, prosecutorial participation in the selection process of SJA involvement in violation of Article 25(d)(2) gives rise to an appearance problem. While improper selection issues are not easily discovered and raised, the defense benefits from long-standing precedent that dictates corrective action even in the absence of specific prejudice. Defense counsel must be ever watchful in monitoring the selection process and resourceful in gathering evidence sufficient to raise an issue. Counsel should be mindful, and must persuade the trial court, that in litigating these issues they are both protecting the accused from prejudice and preserving the integrity of the military justice system.

⁵⁵ The Army Court of Military Review explained in *United States v. Scott*, 25 C.M.R. 636 (A.C.M.R. 1958) that:

Only if there is no effective waiver of such a disqualification [under Article 25(d)(2) or 26(a)], as when it appears for the first time after the trial is finished, is it considered jurisdictional in that it has deprived the accused of a trial before a properly constituted court. If such a disqualification arises during the trial, after findings and before sentence, and is not waived, it merely deprives the court-martial of jurisdiction to continue with the trial until the court is properly re-constituted.
Id. at 640 (footnote omitted).

Improper selection issues are distinct from issues where "the actual constitution of the Article 16 court-martial entity . . . [is] affected." *Wright v. United States*, 2 M.J. 9, 11 (C.M.A. 1976) (trial counsel's lack of certification was not jurisdictional). Issues as to the authority of the appointing official, military status of the members, validity of the appointing orders, etc., are generally jurisdictional and not subject to waiver. *See e.g., United States v. Ridley*, 22 M.J. 43, 47 (C.M.A. 1986) (convening authority must fall within class of persons described in Article 23(a) or jurisdictional error); *United States v. Perkinson*, 16 M.J. 400 (C.M.A. 1983) (absence of written appointment order jurisdictional); *United States v. Ryan*, 5 M.J. 97 (C.M.A. 1978) (failure of convening authority to personally determine composition of court is jurisdictional error); *United States v. Caldwell*, 16 M.J. 575 (A.C.M.R. 1983) (presence of interloper on panel is jurisdictional). The essential difference between these issues and that of improper selection is that with respect to the latter, a competent convening authority has, with proper appointing documents, personally appointed qualified and eligible court members. Improper selection involves an exercise of the convening authority's misguided or fettered discretion, as opposed to an absence of the basic elements necessary to constitute a court under Article 16, UCMJ. *See Wright*, 2 M.J. at 11; *United States v. England*, 24 M.J. 816, 818 (A.C.M.R. 1987).

⁵⁶ In *Wilson*, the Court of Military Appeals, in holding that unit membership ineligibility under Article 25(c)(1) is not jurisdictional and was subject to waiver, noted: "Of course . . . [a]n accused will not be held to have waived a personal disqualification [under Article 25] where specific prejudice is shown, or where the application of waiver would result in a miscarriage of justice." 21 M.J. at 197 (citations omitted). This concept of plain error was reiterated by the court in *Ridley*, 22 M.J. at 48. This appears to be an expansion of the doctrine of plain error, as noted by the Army court in *Deachin*, 22 M.J. at 614-15. This expansion of the plain error doctrine is consistent with the court's sensitivity in the area of the selection and convening of courts-martial, as expressed in *McClain*, 22 M.J. at 132. Thus, the defense does not need to show specific prejudice to raise an improper selection issue at trial, and if not raised at trial, the issue will not be waived if there is specific prejudice.

⁵⁷ The motion must be made before a plea is entered, R.C.M. 905(b)(1) and (d), unless the facts giving rise to an improper selection issue first come to light at a later point. *See Scott*, 25 C.M.R. at 640.

⁵⁸ *See Morgan*, *supra* note 7, at 38.

⁵⁹ *McClain*, 22 M.J. at 127-28.

⁶⁰ *See Marsh*, 21 M.J. at 450 n.4.

⁶¹ *See, e.g., Daigle*, 1 M.J. at 141 ("Improper selection of the court members does not necessarily require that we invalidate all the proceedings in the trial forum.")

⁶² In *McClain*, the court noted:

Even though McClain may contest the selection of the panel, he is not free to attack the findings of guilty. He entered provident pleas of guilty pursuant to a pretrial agreement; and there is no indication that the manner of selecting court members induced this course of action. Accordingly, we are left only with the issue of whether he is entitled to a rehearing on sentence.
22 M.J. at 128 (emphasis added).

⁶³ Note the statements by defense counsel in *McClain*, 22 M.J. at 127, and in *Greene*, 20 C.M.A. at 236, 43 C.M.R. at 76.

⁶⁴ An egregious or willful violation of Articles 37 and 25 together might warrant full reversal irrespective of prejudice of plea. *See United States v. Lynch*, 9 C.M.A. 523, 26 C.M.R. 303 (1958). In *Thomas*, the Court of Military Appeals forewarned that:

A primary responsibility of this court in its role as civilian overseer for the military justice system is to ensure that commanders perform their military-justice responsibilities properly and that they are provided adequate guidance by their legal advisors in performing those responsibilities. Merely remedying the error in the cases before us is not enough. Instead, we wish to make it clear that incidents of illegal command influence simply must not recur in other commands in the future.
22 M.J. at 400.

Clerk of Court Notes

Court-Martial Processing Times

The table below shows the Armywide average general court-martial and bad-conduct discharge special court-martial processing times for the fourth quarter of Fiscal Year 1987 and for the full year.

General Courts-Martial		
	4th Qtr	FY 87
Records received by Clerk of Court	376	1,476
Days from charges or restraint to sentence	51	49
Days from sentence to action	52	50
Days from action to dispatch	5	6
Days from dispatch to receipt by the Clerk	8	8

BCD Special Courts-Martial		
	4th Qtr	FY 87
Records received by the Clerk of Court	151	719
Days from charges or restraint to sentence	34	34
Days from sentence to action	51	47
Days from action to dispatch	6	6
Days from dispatch to receipt by the Clerk	9	8

The tables below compare certain processing times for all courts-martial over the five-year period, FY 1983-FY 1987. "Pretrial" time is the period from the earlier of imposition of restraint or referral of charges to the imposition of sentence. The "post-trial" period is from sentencing to the convening authority's action.

General Courts-Martial					
	FY 1983	FY 1984	FY 1985	FY 1986	FY 1987
Records received	1,778	1,494	1,467	1,534	1,476
Average pretrial days	61	55	51	48	49
Average post-trial days	54	49	52	52	50

BCD Special Courts-Martial					
	FY 1983	FY 1984	FY 1985	FY 1986	FY 1987
Records received	1,649	1,008	892	871	719
Average pretrial days	36	32	31	33	34
Average post-trial days	50	42	47	48	47

Special Courts-Martial					
	FY 1983	FY 1984	FY 1985	FY 1986	FY 1987
Cases reviewed by SJA	1,370	784	536	407	319
Average pretrial days	34	36	37	40	37
Average post-trial days	26	22	30	34	32

Summary Courts-Martial					
	FY 1983	FY 1984	FY 1985	FY 1986	FY 1987
Cases reviewed by SJA	2,882	1,628	1,286	1,331	1,455
Average pretrial days	16	14	15	14	13
Average post-trial days	2	3	8	7	8

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Third Quarter Fiscal Year 1987; April-June 1987

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.51	(2.04)	0.45	(1.82)	0.68	(2.74)	0.49	(1.98)	0.52	(2.07)
BCDSPCM	0.35	(1.40)	0.37	(1.50)	0.38	(1.53)	0.13	(0.51)	0.39	(1.55)
SPCM	0.07	(0.29)	0.09	(0.35)	0.05	(0.20)	0.07	(0.29)	0.00	(0.00)
SCM	0.52	(2.07)	0.46	(1.83)	0.70	(2.81)	0.51	(2.05)	0.19	(0.78)
NJP	33.41	(133.66)	35.10	(140.39)	32.89	(131.56)	32.85	(131.39)	35.19	(140.74)

Note: Figures in parentheses are the annualized rates per thousand.

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Fourth Quarter Fiscal Year 1987; July-September 1987

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.48	(1.92)	0.46	(1.83)	0.56	(2.24)	0.48	(1.91)	0.39	(1.54)
BCDSPCM	0.30	(1.20)	0.32	(1.30)	0.30	(1.22)	0.15	(0.59)	0.13	(0.51)
SPCM	0.06	(0.24)	0.07	(0.29)	0.05	(0.20)	0.02	(0.07)	0.00	(0.00)
SCM	0.51	(2.06)	0.47	(1.89)	0.63	(2.51)	0.57	(2.28)	0.32	(1.29)
NJP	32.50	(130.01)	34.09	(136.34)	31.19	(124.75)	33.65	(134.59)	28.10	(112.42)

Note: Figures in parentheses are the annualized rates per thousand.

Ten-Year Comparison, Fiscal Years 1978-1987

	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987
GCM	1.3	1.7	1.8	1.8	1.9	2.0	1.9	1.8	1.9	1.9
BCDSPCM	1.1	1.2	1.8	2.7	3.3	2.7	1.8	1.7	1.6	1.3
SPCM	5.1	4.1	4.0	3.7	2.1	1.0	.6	.5	.4	.3
SCM	2.4	3.0	4.5	5.6	5.3	3.7	2.1	1.7	1.8	1.9
NJP	200	193	197	201	178	169	145	154	143	128

Note: Five or more one-hundredths have been rounded to the next highest tenth.

Military Justice Statistics

In the November 1987 issue of *The Army Lawyer*, at 53 we published information about court-martial trials in Fiscal Years 1984 to 1986. The table below shows the comparable information for Fiscal Year 1987.

	GCM	BCDSPCM	SPCM	SCM
Cases tried	1,462	1,051	214	1,492
Conviction rate	96.3%	95.1%	83.1%	94.1%
Discharge rate	89.2%	69.7%	NA	NA
GUILTY PLEA cases	68.6%	66.7%	48.1%	46.8%
Judge alone cases	71.2%	78.4%	65.8%	NA
Enlisted court members	17.8%	14.0%	24.7%	NA
Cases with drug offenses	33.8%	25.2%	7.4%	12.6%

Examination and New Trials Note

Supervisory Review Under R.C.M. 1112

Examination of applications for relief under Article 69(b), UCMJ, indicates that some judge advocates do not appreciate the importance of the review of records of trial pursuant to Article 64(a), UCMJ, and R.C.M. 1112. According to AR 27-10, paragraph 14-1d, relief under Article 69 is authorized only when the court-martial is final within the meaning of R.C.M. 1209(a)(2). Records of trial in summary courts-martial and in special courts-martial which do not include an approved bad-conduct discharge must be reviewed in accordance with R.C.M. 1112(d). The judge

advocate's written review and the stamped notation on the promulgating court-martial order in these cases are evidence that review is complete and that the case is final in law. To fully protect the interests of the accused and the government, the judge advocate performing the supervisory review must meticulously examine the record of trial and its allied papers and ensure that the proceedings, findings, and sentence as approved by the convening authority are legally correct in all respects.

Criminal Law Notes

Fraternization Update

Noncommissioned officers attained a measure of equality with commissioned officers on 9 November 1987. On that date, the Army Court of Military Review decided *United States v. Clarke*,¹ and for the first time, declared that Army noncommissioned officers can be charged with fraternization under Article 134, UCMJ.² Relying on the analysis to the fraternization provision in the new Manual,³ the court stated that since 1 August 1984, the effective date of the new Manual, fraternization offenses between noncommissioned officers and their subordinates are punishable under Article 134, UCMJ, if they occur under circumstances of a discrediting nature or are prejudicial to good order and discipline.

Clarke is significant for several reasons. First, it provides notice to all noncommissioned officers in the Army that they are subject to prosecution under Article 134, UCMJ, for fraternization offenses. This clarification of notice was necessary because an earlier Army Court of Military Review decision, *United States v. Stocken*,⁴ held that, absent a regulation prohibiting such behavior, conduct between noncommissioned officers and enlisted soldiers of lower grades did not constitute the offense of fraternization.⁵ *Stocken* involved a male staff sergeant who socialized with and smoked marijuana with two female privates, and had sexual intercourse with one of them. Because the smoking of marijuana was not alleged as unlawful and both parties to the sexual intercourse were single, the court found no precedent for holding this activity between enlisted personnel to be criminal.⁶ *Stocken* was decided on 30 January 1984, six months before the effective date of the new Manual. *United States v. Clarke* declares *Stocken* to be the law before 1 August 1984, but not thereafter. While *Clarke* does not overrule *Stocken*, it declares it obsolete.

The second significant feature of *Clarke* is that it brings the Army into accord with the Navy. In *United States v. Carter*,⁷ decided 28 October 1986, the Navy-Marine Corps Court of Military Review upheld an Article 134 fraternization charge against a Senior Chief Boatswain's Mate (E-8) who dated and had sexual intercourse with a female sailor under his direct supervision.⁸ The court held that such charges were proper after 1 August 1984. Adequate notice that this conduct was improper was found in naval custom and a command instruction forbidding fraternization in any form. Interestingly, *Carter* did not answer the question whether intimate relations between senior enlisted and junior enlisted personnel always violate Article 134, UCMJ. It only addressed the issue in the context of the subordinate being under the direct supervision of the senior. In the Army case, Sergeant Clarke engaged in sexual intercourse with a female private in his barracks room. There is no mention whether the private worked under Sergeant Clarke's supervision, other than a reference to her as his subordinate. Unfortunately, the term "subordinate" is ambiguous, referring either to one who works for another, or merely to one lower in rank. The key under Article 134, UCMJ, is whether the conduct is service discrediting or prejudicial to good order and discipline.⁹ Having sexual relations with a lower ranking soldier under one's direct supervision (*Carter*) or in the barracks (*Clarke*) would both seem to be sufficiently prejudicial to good order and discipline to meet Article 134 standards; however, a discreet, off-post romance between senior-junior personnel who are not in the same chain of command may not violate Article 134, UCMJ.¹⁰

The third significance of *Clarke* is that it provides an additional tool for commanders in dealing with serious fraternization problems. Officer cases can be charged under Article 133 or 134; or as a violation of a local punitive regulation under Article 92, if such a regulation exists.¹¹ Prior to *Clarke*, Army noncommissioned officers could only be

¹ 25 M.J. 631 (A.C.M.R. 1987).

² Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

³ Manual for Courts-Martial, 1984, Analysis of Punitive Articles, paragraph 83 introduction, app. 21, at A21-101 [hereinafter MCM, 1984].

⁴ 17 M.J. 826 (A.C.M.R. 1984).

⁵ *Id.* at 829-30.

⁶ *Id.* 828-29.

⁷ 23 M.J. 683 (N.M.C.M.R. 1986), petition for review dismissed, 24 M.J. 229 (C.M.A. 1987).

⁸ *Id.* at 685.

⁹ See MCM, 1984, Part IV, para. 83c(1):

In general. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. (Emphasis added).

¹⁰ See HQDA Ltr. 600-84-2, 23 Nov. 1984, subj: Fraternization and Regulatory Policy Regarding Relationships Between Members of Different Ranks, para. 3a, where the Army's administrative superior-subordinate relationships policy focuses on senior members who have direct command or supervisory authority over lower ranking members or have the capability to influence personnel or disciplinary actions, assignments, or other benefits or privileges. Army administrative policy, as expressed in paragraph 3c, is that even in these situations, it is the consequences of these relationships, not the relationship itself, that dictate the appropriate corrective actions. Logically, a platoon sergeant could date a platoon member and, if no one knew of the relationship and no partiality existed, the platoon sergeant has not violated the Army's administrative policy.

¹¹ See *Carter*, Fraternization, 113 Mil. L. Rev. 61, 133 (1986) for a sample fraternization regulation. Major Carter's article provides an outstanding history of fraternization as well as background to the Army's present policies.

charged with fraternization under Article 92 if a local regulation prohibited the conduct. Now the existence of a local regulation is unnecessary.

On a common sense level, relationships that undermine the authority and confidence in leaders, whether commissioned or noncommissioned, weaken the effectiveness of the military. The decision in *Clarke* recognizes the importance of strong and effective leadership by noncommissioned officers. They should applaud this decision. Lieutenant Colonel Naccarato.

Rating Chain Challenges for Cause: *Eberhardt* Defies *Murphy's Law*

Must a court member be disqualified if he is the rater for another member of the panel? In *United States v. Eberhardt*,¹² the Army Court of Military Review rejected the Air Force court's view in *United States v. Murphy*¹³ of per se disqualification of a court member who rates another court member.

PFC Eberhardt was charged with pointing a loaded pistol at an officer and violating a general regulation by storing the pistol in his wall locker. He pled guilty and was sentenced by an officer and enlisted court. Several pertinent facts about the court members came to light during voir dire. COL R was the senior rater of CPT H and had periodic intermittent professional contact with him. LTC M was the rater and direct supervisor of MAJ M and had daily contact with him. 1SG P was SFC L's first sergeant and SFC L worked for 1SG P as his mortar platoon sergeant.

Defense counsel challenged MAJ M, CPT H, and SFC L for cause on the grounds of their being rated by another member of the panel. The military judge denied the challenges based on the exculpatory declarations of the challenged members in response to the judge's leading questions. Each of the members stated that they would not feel pressured to agree with their raters and that they could freely exercise their own independent judgment.¹⁴

Trial counsel exercised his peremptory challenge against CPT H. Defense counsel peremptorily challenged MAJ M and stated that had his challenge for cause against MAJ M been granted, he would have used his peremptory challenge against another member of the panel.¹⁵

On appeal, the defense argued that the rating chain challenges for cause had been improperly denied by the military judge. The Army court concluded that the rating chain relationship was a matter of concern and one that deserves careful scrutiny, but was not a per se disqualifier.¹⁶ The court decided not to follow *Murphy*.

In *United States v. Murphy*,¹⁷ the Air Force Court of Military Review held that two colonels, the president of the panel and another senior member, should have been disqualified upon discovery that they wrote or endorsed the efficiency reports of two other members. On reconsideration, the Air Force court affirmed its earlier decision and relied on its reading of the Court of Military Appeals' decision in *United States v. Harris*¹⁸ to reason that a rating chain relationship raised "an appearance of evil in the eye of disinterested observers."¹⁹ The Air Force court announced a rule of per se disqualification of court members who rate other court members, and rejected the government's contention that such a rule adversely affected the administration of military justice by making it unduly burdensome for a convening authority to select a panel of qualified court members.²⁰

In *Eberhardt*, the Army court rejected *Murphy's* law of per se disqualification. The existence of a rater-rated relationship on a panel is a matter of concern, and one that demands careful additional inquiry, but a rating chain relationship does not require per se disqualification of one of the members.²¹

The Army court cited three reasons for declining to follow *Murphy*. First, *Murphy's* per se disqualification of rating chain members would adversely affect the administration of military justice. "Realizing that our system of military justice must work in war as well as peace, such a per se rule would create a 'nightmare' for a commander in a combat zone."²² The court cited the difficulties that would be faced by small military units in the Persian Gulf, in isolated posts, or in units deployed in remote areas if a rating chain relationship were a per se disqualifier.

Second, a legalistic rule that breaches the rater-rated relationship "on the premise that the mere relationship is untrustworthy is a direct attack on the very heart of a professional Army."²³ The relationship and communication between the rater and the rated individual is the basis for determining who is retained, promoted, or eliminated. It is

¹² 24 M.J. 944 (A.C.M.R. 1987).

¹³ 23 M.J. 764 (A.F.C.M.R. 1986).

¹⁴ *Eberhardt*, 24 M.J. at 945.

¹⁵ This statement by defense counsel is necessary to preserve the issue of a denied causal challenge for appellate review. MCM, 1984, Rule for Courts-Martial 912(f)(4) [hereinafter R.C.M.]. A related issue in *Eberhardt* was whether defense counsel must also identify by name the person who would have been peremptorily challenged. The court held "No."

¹⁶ The court held that the challenge for cause against MAJ M should have been granted, but on other grounds. Based on the "free from doubt" standard articulated in *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985) and *United States v. Moyer*, 24 M.J. 635 (A.C.M.R. 1987), the fact that MAJ M's wife was the recent victim of an unsolved aggravated assault, plus the fact that MAJ M's superior, who was a strong proponent of gun control laws, was also a member of the panel, constituted adequate grounds to disqualify MAJ M.

¹⁷ 23 M.J. 690 (A.F.C.M.R.), *reconsidered*, 23 M.J. 764 (A.F.C.M.R. 1986).

¹⁸ 13 M.J. 288 (C.M.A. 1982).

¹⁹ *Murphy*, 23 M.J. at 765.

²⁰ *Id.*

²¹ *Eberhardt*, 24 M.J. at 946. *Murphy* requires per se disqualification of the rating officer. That was not the specific issue addressed in *Eberhardt*. *Eberhardt* addressed whether either of the persons in the rater-rated relationship must be disqualified because of that relationship.

²² *Id.* at 946.

²³ *Id.* at 946.

the heart of the evaluation reporting system, which is an essential tool in the effectiveness of the Army. If officers are to be trusted to give frank, candid opinions and advice to their raters and others, then a rule that derides this relationship undermines the professionalism of the Army.

Third, the Army court failed to find a persuasive rationale for following *Murphy's* rule of per se disqualification of raters. *Murphy* relied on *United States v. Harris*, and the Air Force court characterized the facts in *Murphy* as "virtually identical"²⁴ to those in *Harris*. Although not noted by the Army court, there are important factual differences in *Murphy* and *Harris* that merit discussion.

Harris was charged with several larcenies from the post gym. The Court of Military Appeals held that the military judge improperly denied a challenge for cause against a colonel, the panel president, who rated three other court members, worked with two of the theft victims and advised them to report their thefts to the military police, and chaired a base resources protection committee and had an official interest in discouraging larcenies. Based on all of these factors, and not solely on the rating chain relationship, the court found that it was error to deny the challenge for cause.²⁵ Importantly, the court noted that there was nothing in the record of trial that indicated that the colonel should have been disqualified "simply because of his relationship to those three other members" who he rated.²⁶ In spite of this, the Air Force court depicted the facts in *Harris* as "virtually identical" to those in *Murphy* and relied on *Harris* as precedent for its decision in *Murphy*.²⁷

Murphy has been certified to the Court of Military Appeals for review.²⁸ When it addresses this issue, the Court of Military Appeals should follow the Army's *Eberhardt* decision. A rating chain relationship is not one of the grounds for challenge of court members set out in R.C.M. 912(f). It is not a disqualifier under Article 25 of the UCMJ. If Congress intended it to be a disqualifier per se, it should be listed in the Manual as one. If officers are trusted to give frank, candid, and honest advice, perhaps ultimately in the heat of battle where lives may be at stake, then they should be trusted to make the same honest and independent decisions in matters as weighty as court-martial duty. Assuming anything less "undermines the professionalism and mission effectiveness of the Army" and all the services.²⁹

A rating chain relationship deserves careful scrutiny to ensure that each member feels free to exercise unfettered independent judgment. It does not require per se disqualification of the senior member. *Murphy's* law is an

example of well-intentioned judicial activism, neither required by the Code nor endorsed by the *Harris* decision. It is a laudable goal that may be workable at the larger Air Force bases, but one that should not be mandated throughout the services. Captain Lisowski.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, Army, JAGS-ADA-LA, Charlottesville, VA 22903-1781, for possible publication in *The Army Lawyer*.

Alternative Dispute Resolution

As previously noted in this column,³⁰ there are many advantages inherent in resolving disputes without the time and expense of going to court. Many communities, particularly rural communities with relatively close-knit, stable populations, have historically made only infrequent use of the judicial system to resolve disputes, using the church hierarchy and the local sheriff as mediators and arbitrators.³¹ More formalized dispute resolution programs have grown quickly in the more mobile urban settings, where there is seldom an informal structure available to resolve disputes and where the high cost of litigation, in terms of both time and money, provides a clear incentive to find an alternative to court.

The phenomenal increase from three dispute mediation centers in 1971 to more than 180 in 1982 and 300 in 1987 reflects this dissatisfaction with the "traditional" approach to resolving disputes through the judicial process. The most common types of dispute resolution programs include county, city, and state sponsored consumer affairs offices, Better Business Bureaus, trade association dispute resolution mechanisms, and industry sponsored programs. Additional consumer assistance programs include media sponsored "action line" programs, government operated occupational and professional licensing boards, and dispute resolution mechanisms sponsored by the courts (especially small claims courts) and by federal and state regulatory agencies.

Legal assistance attorneys (LAA's) should be aware of existing alternative dispute resolution (ADR) programs, alert to ways in which they can become involved in these

²⁴ *Murphy*, 23 M.J. at 691.

²⁵ *Harris*, 13 M.J. at 292.

²⁶ *Id.* at 289.

²⁷ *Murphy*, 23 M.J. at 690.

²⁸ *Murphy*, 23 M.J. 764 (A.F.C.M.R. 1986), certificate for review filed, 23 M.J. 347-8 (C.M.A. 1987), petition for grant of review filed (cross petition), 24 M.J. 75 (C.M.A. 1987).

²⁹ *Eberhardt*, 24 M.J. at 946.

³⁰ See, e.g., Letter, DAJA-ZA, Office of The Judge Advocate General, U.S. Army, to Command and Staff Judge Advocates, subject: Alternative Disputes Resolution, 8 May 1987, reprinted in *The Army Lawyer*, July 1987, at 3; Note, *Alternative Disputes Resolution*, *The Army Lawyer*, July 1987, at 54 (this article includes information regarding the resolution of small claims, including an explanation of the concept behind small claims resolution programs, rules for such programs, a sample application for arbitration form, and a sample arbitration form).

³¹ "Mediation" typically involves a trained negotiator who discusses a problem with the disputants together and, when appropriate, separately, with the goal of arriving at a mutually agreeable solution. "Arbitration" is a system similar to "People's Court," in which a decision-maker hears both sides of a dispute and then determines and mandates appropriate relief. Many ADR systems are tiered, so that the parties first try mediation and, if they come to no agreement, then submit the dispute to arbitration. If the arbitrator's decision is nonbinding, as it is in most mandatory arbitration programs, dissatisfied parties may appeal the arbitrator's decision to the courts.

programs, and prepared to advise their clients regarding the mechanics and advantages of such programs.³² Experience in the civilian sector indicates that the success of an ADR program is usually dependent on one or more of the following factors.

1. Participation is mandated by the court, agency, or other level at which such disputes were formerly resolved. Ten federal district courts and fifteen state courts require arbitration prior to entering court if the dispute is under a certain designated amount. Mandatory programs typically render nonbinding decisions, but some courts exact high fees if the appealing party fails to obtain a substantially better result in court than was offered pursuant to the dispute resolution process. Many state attorney generals' offices attempt to use ADR to resolve consumer disputes before seeking cease and desist orders or taking other enforcement action.

2. The system is less costly than going to court in terms of time and money. ADR programs typically require neither payment of more than a minimal administrative fee nor provision of mediators or arbitrators as a cost of using the program's services. A recent study indicated that the average cost of a small claims jury trial is \$8,000, while the average cost of a comparable arbitration proceeding is \$150.

3. The system is more flexible than judicial resolution, with respect to both scheduling and the evidence considered. Mediation/arbitration sessions can be held after normal work hours, so participants do not lose valuable salary. The arbitrator can consider all relevant information without respect to technical rules of admissibility. In addition, the parties' feelings, desires, and priorities can be factored into the decision-making process in addition to pure "facts."

4. The parties participate in the decision-making process and are, therefore, more likely to comply with the arbitrated decision than where the judgment is dictated. In ADR proceedings, parties retain the opportunity to be heard and feel that they control the decision-making process rather than being controlled by it. On average, around 80% of the cases that enter mediation result in agreement and one study indicates that approximately 90% of these agreements have remained in effect six months later.

5. The dispute is resolved by a neutral third party. Many programs use volunteer mediators and arbitrators, and most provide training at no cost. Many ADR programs require that those who function as mediators and arbitrators be trained and certified by that program. The ABA Dispute Resolution Committee is involved in training mediators and arbitrators for many arbitration centers.

6. Members of the civilian community may consent to the submission of disputes to arbitration at the request of the military community if the livelihood of the local economy depends on the military presence.

Numerous resources are available to assist judge advocates identify local programs. Among the best are:

1. Business groups such as Better Business Bureaus (BBB) and chambers of commerce.
2. Local and state bar associations.
3. Consumer affairs and consumer protection groups and offices.
4. District attorneys' and attorney generals' offices.
5. Court planning and development offices.
6. Mayors' committees.
7. Community service organizations.

If the LAA needs information regarding programs in a distant locale, the *Consumer's Resource Handbook* includes addresses, phone numbers, and other information for state, county, and city government consumer protection offices and for Better Business Bureau offices.³³ Single free copies of the *Handbook* may be obtained by writing to: *Handbook*, Consumer Information Center, Pueblo, CO 81009. If further information regarding ADR programs is needed, the LAA can contact the following:

1. Society of Professionals in Dispute Resolution (SPIDR), National Office, Suite 909, 1730 Rhode Island Avenue, N.W. Washington, D.C. 20036, (202) 833-2188.
2. ABA Special Committee on Dispute Resolution, 1800 M Street N.W., Suite 2005, Washington, D.C. 20036, (202) 331-2258.
3. American Arbitration Association.
 - a. 140 West 51st Street, New York, NY 10020, (212) 484-3237 or (212) 484-4000.
 - b. 445 Bush Street, 5th Floor, San Francisco, CA 94108, (415) 981-3901.

In the civilian sector, ADR programs are popular because they reduce the level of dispute resolution from a judicial officer to a level that is more efficient, more flexible, more accessible, and more personal. Civilian programs that have sought to escalate the level of dispute resolution from a less formal level, such as an employer or a parish priest, to a more formal level, such as a community ADR program, have typically not been successful. In the military community, however, there are some circumstances in which it is advantageous to raise the level of dispute resolution to a more formal level.

For example, Fort Hood has successfully developed and run the Village Court Program, designed to mediate and, when mediation fails to resolve a problem, to arbitrate disputes among occupants of the post housing area and between occupants and post officials. Fort Hood and other installations instituting similar dispute resolution programs have identified five primary reasons for escalating the level of dispute resolution and due process protections in specified circumstances.

1. The "normal" dispute resolution is overburdened. Where, for example, the population of a housing area has suddenly grown substantially, the command structure that

³² Attorneys at Fort Bragg and Fort Ord have become involved in ADR programs administered by the civilian community. Although judge advocates need not participate as mediators or arbitrators in these programs to give soldiers access to the programs, participation by military attorneys may carry significant advantages. Not only does participation by military attorneys improve military-community relations, but participation in dispute resolution programs also enables military attorneys to advise legal assistance clients of the evidence and arguments that prove most persuasive to decision-makers in this context.

³³ The *Handbook* also includes addresses, phone numbers, and consumer points of contact for industry third-party dispute resolution programs, many businesses, automobile manufacturers, trade associations, state banking authorities, state commissions and offices on aging, state insurance regulators, state utility commissions, numerous federal agencies, and others.

previously managed such complaints may be unable to handle the additional volume. This might also occur where a restructuring of responsibilities places so many additional responsibilities on the command that those who previously managed a category of complaints no longer are able to do so.

2. It fills a void by establishing a dispute resolution mechanism where previously no satisfactory resolution was possible. Minor conflicts, such as housing area disputes between neighbors, can become major problems when the parties are unable to resolve the disagreement through existing agencies. During the early history of the Fort Hood Village Court Program, for example, a neighborhood dispute was successfully resolved through this dispute resolution vehicle where the neighbors previously had unsuccessfully sought intervention by thirteen different on-post offices and agencies.

3. It increases compliance with the resolution by making the parties participants in the resolution process. Experience indicates that people are more likely to comply with a decision when they are part of the decision-making process.

4. It increases the fairness and the perceived fairness of the system. If a dispute resolution system is unfair because the decision-maker is biased toward one of the disputants, because the parties are not permitted to present information critical to the decision-making process, or for some other reason, participants are less likely to comply with the mandated resolution. Similarly, if the disputants believe that a dispute resolution is unfair, they are less likely to honor its determinations even if the system should happen not to suffer from the suspected infirmities.

5. It deters misconduct by making the dispute resolution process more visible. As with all enforcement systems, awareness that the rules will be enforced serves as a deterrent. Fort Hood's Village Court Program is discussed in post publications, which often publish the results of arbitration proceedings.

While the Village Court Program is not an "ADR" program in the sense in which that term is used in the civilian sector, it does present an "alternative" to the means of dispute resolution previously used. LAA's who are contemplating participating in community programs or developing installation programs should coordinate their efforts with the administrative law section to ensure compliance with regulatory restrictions. Among the issues that should be addressed during the developmental stage are the following.

1. Can the installation publish a list of businesses that participate in an ADR program? Dep't of Army, Reg. No. 600-50, Personnel—General—Standards of Conduct for Department of the Army Personnel, para. 1-4f(2) (28 Jan. 1988), prohibits Department of the Army (DA) personnel from taking any action "that might result in or reasonably be expected to create the appearance of . . . [g]iving preferential treatment to any person or entity." In addition, Dep't of Army, Reg. No. 360-61, Army Public Affairs—Community Relations, para. 2-3a, (15 Jan. 1987), provides that "Army participation must not selectively benefit any person, group, or corporation, whether profit or nonprofit . . . or commercial venture." Because the proposed list could create the perception of selectively

benefiting the businesses listed, it should contain a clear disclaimer of any DA endorsement.

2. Can businesses advertise their participation in ADR programs established by installations? Dep't of Army, Reg. No. 360-5, Army Public Affairs—Public Information, para. 3-37b(1), (24 Dec. 1986) [hereinafter AR 360-5], indicates that it is the Army's general policy "not to assist in the production of any advertisement or promotional venture which implies Army endorsement of a commercial product, service, or company. However, specified material and activities of the Army may be approved for use in commercial advertisements and promotions" as long as they violate neither public law, Department of Defense policy, nor DA policy and the following criteria are met.

- a) Materials or activities [are] depicted factually and . . . in good taste.
- b) Use of the materials or activities [is] in the best interests of the Government and of DA.
- c) All implications of DA endorsement [are] avoided.
- d) The material [contains] a proper disclaimer, if circumstances require.
- e) Claims made or implied in the material are not misleading.

AR 360-5, para. 3-37b(1). In addition, AR 360-5, para. 3-37b(2), indicates that organizations "desiring to use Army themes in advertising, promotion, or information campaigns should submit prepared treatments of such themes to [the Office of the Chief of Public Affairs]" for approval.

3. Can business involvement in installation ADR programs be advertised in Authorized Army (AA) newspapers and Commercial Enterprise (CE) newspapers? Guidance in this regard is provided in Dep't of Army, Reg. No. 360-81, Army Public Affairs—Command Information Program (21 Jan. 1986) [hereinafter AR 360-81]. Generally, AA newspapers (newspapers printed with appropriated funds) "may carry no commercial advertising." AR 360-81, para. 3-40a. CE newspapers (defined as "[n]ewspapers published by commercial publishers under contract with Army components or their subordinate commands," AR 360-81, para. 3-3a(2)), may contain no "material that implies that the Army or any of its components endorses or favors a specific commercial product, commodity, or service." AR 360-81, para. 3-14a. Judge advocates should also review AR 360-81, para. 3-29, which identifies responsibilities regarding advertising.

4. Can a Housing Referral Office (HRO) refuse to list a property if the landlord does not agree to include an ADR clause in leases with soldiers? Before considering this action, those initiating the ADR program should evaluate whether the exclusion of landlords who refuse to participate in the ADR program is in the best interests of the Army. If the vigor of the local economy depends on the military presence, landlords who depend on soldier-tenants for their income may be willing to mediate or arbitrate disputes in exchange for their inclusion on the housing referral list. If, however, there is no incentive for landlords to rent to soldiers (where, for example, available housing is in great demand or the landlords do not want soldiers as tenants), the landlords may be pleased to be excluded from the HRO referral list.

Dep't of Army, Reg. No. 210-51, Installations—Army Housing Referral Service Program (1 June 1983), mentions eligibility for HRO listing only with respect to the suitability of rental properties for housing based on environmental considerations such as health and safety. It therefore appears that refusal to list a landlord's property is a matter of policy regarding which the proponent of the regulation should be contacted. As an alternative to refusing to list these properties, the HRO can merely identify the landlords who have agreed to resolve any disputes with soldier-tenants (or their family members, where appropriate) through the ADR program. In this manner, the maximum number of listings will remain available while tenants retain access to the ADR program.

5. Can arbitrators in installation ADR programs render and enforce money judgments against soldiers? While soldiers can, of course, agree to submit a dispute to binding arbitration, enforcing compliance with the arbitrator's decision is difficult because there is no authority for an installation to establish a "court" with jurisdiction over civil matters and the authority to enforce "money judgments." Other than the procedures established by Uniform Code of Military Justice art. 139, 10 U.S.C. § 939 (1982), there is no basis for making involuntary deductions from a soldier's pay. Dep't of Army, Reg. No. 37-104-3, Financial Administration—Military Pay and Allowance Procedures, Joint Uniform Military Pay System—Army, para. 60103 (15 June 1973), indicates that under these circumstances even a voluntary allotment could not be used to transfer money to another soldier.

Notwithstanding these hurdles, Fort Hood's Village Court Program indicates that installation "ADR" programs can be very effective. Attorneys considering initiation of installation programs and those contemplating involvement in other ADR programs might find the following references helpful.

1. BNA's Alternative Dispute Resolution Report. To order the report, contact: The Bureau of National Affairs, Inc., Circulation Department, P.O. Box 6036, Rockville, MD 20850-9990, (301) 258-1033, (800) 372-1033.

2. Fuller, *Mediation: Its Forms and Functions*, 44 S.C.L. Rev. 305 (1971). Volume I, No. 2 (Fall 1986), features a special symposium on critical issues in mediation legislation including examination of confidentiality, mediator immunity, enforceability of mediated agreements, and proposed legislation.

3. J. Folbert & A. Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation* (1984).

4. S. Goldberg, E. Green & F. Sander, *Dispute Resolution* (1985). This was the first commercial law school text on ADR. There are now a 1987 supplement and a chapter on court-sponsored settlements.

5. *Dispute Resolution Forum*, published by the National Institute for Dispute Resolution. Single free copies are available from: Dispute Resolution FORUM, 1901 L Street N.W., Washington, D.C. 20036.

6. National Institute for Dispute Resolution, *Consumer Dispute Resolution: A Survey of Programs* (1987).

7. R. Fisher & W. Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (1981).

8. *Missouri Journal of Dispute Resolution*. The first issue was published in September 1984.

9. *Ohio State Journal on Dispute Resolution*. Copies may be obtained by contacting: 1659 High Street, Columbus, OH 43210-1306.

10. Administrative Conference of the U.S., *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (Office of the Chairman, 1987). Copies may be ordered from the Superintendent of Documents, U.S. Government Printing Office, (202) 783-3238, stock number 052-003-01070-4, cost \$31.00.

11. R. Coates & J. Gehn, *Victim Meets Offender: An Evaluation of Victim-Offender Reconciliation Programs* (1987). Single copies may be obtained by writing: The PACT Institute for Justice, 106 N. Franklin, Valparaiso, IN 46383. This is a forty-three page summary of research evaluating the use of mediation between crime victims and offenders in order to obtain restitution agreements. The study discloses high satisfaction and agreement rates for both victims and offenders who go through mediation.

12. "Public Sector Policy Dispute Resolution" is a simulation and videotape produced for classroom use by the UCLA Extension Public Policy Program, the Program on Negotiation at Harvard Law School, and the Lincoln Land Institute. It is available from the Program on Negotiation. For ordering information, write: Program on Negotiation, 5009 Pound Hall, Harvard Law School, Cambridge, MA 02183.

Staff judge advocates and their attorneys who develop or participate in ADR programs sponsored either by the civilian community or within the military community are encouraged to so inform the Legal Assistance Branch, TJAGSA, so these experiences can be shared with others who are contemplating or refining similar programs. Major Hayn.

Consumer Law Notes

Applying the Fair Debt Collection Practices Act to Legal Assistance Attorneys

Among other consumer protections, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C.A. § 1692 (West Supp. 1987), regulates the conduct of debt collectors by prohibiting debt collectors from contacting third parties regarding a consumer's indebtedness absent a court order or the consumer's consent. When this statute became effective in 1978, it excluded from the definition of "debt collector" "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." 15 U.S.C. § 1692a(6)(F). When this exemption for attorneys was removed by Public Law 99-361, effective 9 July 1986, attorneys were no longer excluded from the definition of "debt collector." Consequently, since this 1986 revision, attorneys who are otherwise included within the definition of "debt collector" will not be excluded from the restrictions imposed by the FDCPA merely because they are attorneys.

Although this change in the law was significant for attorneys who were functioning as debt collectors, it has no impact on legal assistance attorneys (LAAs) because LAAs do not fall within the definition of "debt collector." 15 U.S.C. § 1692(6) defines "debt collector" as any person "in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect . . . debts owed or due or asserted to be owed or due another." LAAs may perform the functions listed in Dep't of Army, Reg. No. 27-3, *Legal Services—Legal Assistance*, para. 2-2 (1 Mar. 1984), including: domestic relations, wills and estates, adoptions and name changes, taxes, landlord-tenant relations, consumer affairs, and other services listed

in the regulation or authorized by the staff judge advocate. The regulation does not, however, authorize LAAs to conduct a "business the principal purpose of which is the collection of . . . debts."

If the legal assistance office were so large that all LAAs specialized and one LAA maintained responsibility for assisting all clients seeking satisfaction of debts, a job consuming the majority of the attorney's time, that LAA would arguably fall within the definition of debt collector. Although realistically this situation will not arise, if it should, the LAA would still be excluded from the definition of "debt collector" because that term does not include "any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties," 15 U.S.C. § 1692a(6)(C), or "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client," 15 U.S.C. § 1692a(6)(F). Legal assistance attorneys who are attempting to collect money under other circumstances are welcome to contact me for further information, as soon as they are finished talking to their state bar disciplinary commissions. Major Hayn.

Telemarketing Fraud—More "Free" Prizes

In Missouri, the attorney general has alleged that Western Distributing, Inc., a Las Vegas company, offers consumers free prizes but then charges the consumers about \$200 for promotional items in order to be eligible for the prizes. This company has also allegedly operated under the name of American Clearing House, offering consumers free prizes with no obligation. The prizes typically include a new color television, a 1987 Chevrolet Sprint, and a certificate worth \$25,000 in home entertainment merchandise. The attorney general claims that the company does not inform consumers that in order to be eligible for the prizes they must: pay a \$79 processing fee, purchase promotional items such as pens and ice scrapers, purchase every item in the company's catalog (priced higher than the manufacturer's suggested retail price or the price at which the items could be purchased locally), and spend about \$20,000 to receive the guaranteed \$25,000. Major Hayn.

Family Law Notes

Child Custody

Child custody and visitation problems continue to occupy a great deal of judicial time, and recent decisions from the Supreme Court as well as state courts reinforce one of the most basic principles for counsel to bear in mind when advising clients on these matters: self-help is not the answer.

This rule is nowhere better highlighted than in *California v. Superior Court*, 107 S. Ct. 2433 (1987), a case discussed in the September 1987 issue of *Fairshare*. The facts are somewhat complex, as is frequently the case when a parent tries to thwart the legal system by denying the other parent the opportunity to visit or have custody of their child. It is important to review the setting, however, to understand the decision's significance.

The parties were divorced in California in 1978, with custody of the two minor children awarded to the mother, Judith Smolin. Richard, the father, received visitation

rights. Judith remarried the next year and thereafter spirited the children away to Oregon, telling Richard neither that she was leaving nor where she was going. Upset by this turn of events, Richard asked a California court to modify the custody decree to provide for joint custody, and the court obliged. Its exercise of jurisdiction was consistent with both the Uniform Child Custody Jurisdiction Act (UCCJA) and the Federal Parental Kidnapping Prevention Act (FPKPA) (28 U.S.C. § 1728A). Richard subsequently initiated contempt proceedings in California against Judith, and he asked the court to award him sole custody.

In the meantime, Judith had moved to Texas, and she asked that state's court to reaffirm the custody provisions embodied in the original (and now obsolete) California decree. The Texas court did so despite jurisdictional problems, in part perhaps because Judith had failed to advise it about the modification of the California order and the pending proceedings for a further change in custody and for her alleged contempt. In February 1981, California awarded Richard sole custody.

By the time Richard located Judith to enforce the most recent California custody order (which is probably the only valid decree in this case), she had moved with the children to Louisiana. At this point, he abandoned remedies available through the legal system. Although this shift in approach is perhaps understandable in light of the frustrations he had experienced, it became his undoing. He went to Louisiana and picked up the children at their school bus stop, and returned to California with them.

Now it was Judith's turn to seek legal redress. Alleging that she was entitled to custody, she swore out an affidavit claiming that Richard had illegally kidnapped the children. A warrant was issued for Richard's arrest, and Louisiana asked for his extradition from California. In taking this action, Louisiana apparently disregarded the impact of the FPKPA, which provides in pertinent part that "the appropriate authorities of every state shall enforce according to its terms, and shall not modify except as provided [elsewhere in this section], any child custody determination made consistently with the provisions of this section by a court of another State."

Finding that the FPKPA would preclude Louisiana from convicting Richard for parental kidnapping, a California court blocked the extradition request. This ruling, however, seemed to violate the constitutional extradition clause (art. IV, § 2, cl. 2) and the federal Extradition Act (18 U.S.C. § 3182). The conflict between the effect of the FPKPA and the Extradition Act set the stage for resolution by the Supreme Court. Must Richard be extradited for prosecution in Louisiana?

"Yes," said a majority of the justices. The opinion dwells little on the sordid tale of Judith's contempt of court, duplicity, and false swearing. The majority viewed the case simply as an extradition matter, thus distilling the legal question to whether California had any authority to examine the merits of the charge that was pending in Louisiana. Their answer was that California had no such discretion, and thus extradition was mandated. The dissent casts the matter as a child custody dispute, controlled by the FPKPA and state law (i.e., the UCCJA as enacted by the appropriate state).

The teaching point is clear—resort to self-help in child custody matters is fraught with danger, even when the parent is doing no more than asserting a legal right that exists beyond dispute.

Part of this decision's importance rests on a state's willingness to pursue criminal enforcement against a parent who allegedly kidnaps a child. But how common is it for a state to initiate criminal action in such cases? Case law suggests that states may be getting more aggressive in this regard. Three different courts have recently held that a visiting parent who fails to return a child to the custodial parent after a period of visitation has violated the state's criminal statutes. See *Wheat v. Alaska*, 734 P.2d 1007 (Ct. App. Alaska 1987); *Illinois v. Caruso*, 152 Ill. App. 3d 1074, 504 N.E.2d 1339 (1987); *Rios v. Wyoming*, 733 P.2d 242 (Wyo. 1987).

In each of these cases, the parent who allegedly committed the offense did so while residing outside the state. Thus, consider the hypothetical case of a soldier stationed in Texas who arranges for a child to be flown from the custodial parent's home in Wyoming for visitation in Texas and who then refuses to return the child. If there is a court order establishing the other parent's right to custody, the soldier could be extradited to Wyoming for a violation of Wyoming law (i.e., interference with a Wyoming resident's custodial rights) and there be subjected to criminal prosecution. It would be no defense that the soldier had never before stepped foot in Wyoming. Neither must the custody decree emanate from a Wyoming court; it is enough that some valid court order exists and affords the other parent the right to custody.

Given the extent of our legal assistance clients' international mobility, it is also worth noting that U.S. jurisdictions are showing a willingness to apply UCCJA limitations when asked to exercise jurisdiction and ignore custody proceedings pending in foreign courts. At least four different states have declined to hear cases initiated by U.S. citizens because a court in another country already had jurisdiction over the matter.

Thus, in *Middleton v. Middleton*, 227 Va. 82, 314 S.E.2d 549 (1984), the Virginia Supreme Court found that a state trial court should decline to entertain an action to modify its own earlier custody order because the children had resided in England for the preceeding six years. Instead, the

custody dispute should be heard by the English court where the mother initiated an action to remedy the father's refusal to return the children after a period of visitation in Virginia. In *Klont v. Klont*, 130 Mich. App. 138, 342 N.W.2d 549 (1984), a Michigan appellate court held that the trial court should have deferred in exercising jurisdiction in a child custody case because a West German court already had jurisdiction over the dispute and the parties. More recently, a Texas court deferred to a Mexican court's jurisdiction in an ongoing divorce and custody matter. *Garza v. Harney*, 726 S.W.2d 198 (Tex. Ct. App. 1987). The Mississippi Supreme Court came to the same conclusion regarding a matter pending before a Canadian court. *Laskosky v. Laskosky*, 504 So. 2d 726 (Miss. 1987).

The overall result of these recent cases in this often-litigated corner of the law is a reaffirmation of the notion that self-help and dirty tricks will not be rewarded. A concern for the child's best interests is a concept that pervades all these decisions, and that is a trend few will want to criticize. Major Guilford.

Child Support Developments

West Germany recently enacted legislation that allows its officials to enter into reciprocal agreements with individual states regarding child support enforcement. Consequently, Germany may be treated just as another state in Uniform Reciprocal Enforcement of Support Act (URESA) actions in those jurisdictions that have such agreements. This will allow a more streamlined support enforcement procedure than the old method of seeking assistance through the *Deutsches Institut fuer Vormundschaftswesen* (the DIV, or German Institute for Guardianship Affairs). Parents who are entitled to receive support from obligors located in West Germany (including soldiers and civilians stationed there) may now be able to seek assistance through the local state child support enforcement agency.

Mr. Robert Dunn of the Office of the USAREUR Judge Advocate reports that as of November 1987, twelve states had entered into such reciprocal agreements. They are: California, Connecticut, Georgia, Idaho, Illinois, Maryland, Montana, North Carolina, North Dakota, Oregon, South Dakota, and Tennessee. Major Guilford.

Claims Report

United States Army Claims Service

Some Tips on Automobile Damage Estimates

*Captain Harold E. Brown, Jr.
CONUS Torts Branch*

Settling automobile claims almost always requires the use of damage estimates from body shops, car dealerships, and insurance companies. Many claims offices tell claimants to

secure estimates of repair to submit with their claims. To properly review an estimate, however, a claims examiner

must understand the procedure an estimator follows in preparing the estimate. The article identifies how a damage estimate is prepared and discusses common pitfalls and abuses in the industry. Although this article specifically applies to tort claims settled under Dep't of Army, Reg. No. 27-20, Legal Services—Claims chapters 3 and 4 (10 July 1987) [hereinafter AR 27-20], many of the points apply to vehicle claims settled under chapter 11.

A damage estimate is usually prepared according to a standard sequence: start at the front, examine under the hood, walk around the car starting at the left front, to the rear, and up the right side back to the front. This sequence should be reflected on the estimate sheet prepared by the repair shop. You should be suspicious if the repair estimate jumps around and does not seem to follow a sequence. The estimate may contain "overlap" or "included operations." Both of these types of overcharging are discussed later in the article.

The repair shop must then estimate the cost of labor and materials to repair the car. To do this, most shops use an estimating guide. The guide resembles a big-city telephone book, and is published monthly or quarterly. Motor Publications and Chilton both publish guides, with separate issues for domestic, foreign, and older cars. Each guide contains useful general information about estimating damages, as well as specific information about each make and model covered by the guide. For example, the estimating guide will tell the shop that it should take .4 hour to remove the grille on a 1980 Honda Civic CVCC, and that the grille has a factory list price of \$52.36. The guide has a diagram showing how the grille is attached to the car.

Use of an estimating guide allows the repair shop to fairly estimate the cost of repairs, and to ensure that they are adequately paid for their work. By using an estimating guide, the shop avoids overcharging for the repair. Insurance companies require adjusters to check estimates for overcharges. The following are some of the ways overcharges creep into an estimate.

"Overlap" is an excess labor charge that results from a body shop charging for duplicate repair operations to adjacent components. For example, in removing a quarter panel and rear panel, the place where these two items join is considered overlap. Less time is required to remove both in one operation and the repair estimate should be reduced accordingly. Estimating guides contain detailed discussions and deductions for overlap.

"Included operations" are tasks that can be performed separately, but are also part of another operation. For example, replacing a fender panel may include the time to remove and replace the headlight assembly and aim the headlight. Separate labor charges for replacing the fender panel, replacing the headlight, and aiming the headlight are unwarranted and may double the repair estimate. Estimating guides list included operations separately and allow an estimator to spot included operations.

Estimates may include a charge for hidden damage, or damage that the estimator cannot assess until the vehicle is torn down. Hidden damage may also be listed as an open item on an estimate. Always call the shop and inquire about open items. Estimating guides, with their detailed "blow apart" diagrams of automobile components, help an estimator look for hidden damage. Sometimes simply questioning

the estimate will resolve the matter, and the estimator will remove the charge or satisfactorily estimate the cost of repair.

When the repair cost cannot be estimated because of hidden damage, the claims judge advocate should be alert to the issue of loss of use, especially if the claim is cognizable under the Federal Tort Claims Act (AR 27-20, ch 4). Payment of the claim may be delayed several months if the settlement is over \$2500.00, because the claim must be submitted to the General Accounting Office (GAO) for payment.

Is the claimant entitled to be reimbursed for a rental car while payment is delayed, because the shop will not release the car to the owner? The answer to this question requires the claims judge advocate to resolve two issues. First, research whether the claimant is entitled to loss of use under state law. If the claimant is entitled to claim loss of use, then any delay associated with payment of the claim by GAO may increase the amount of reimbursement for loss of use. Second, remember that the claimant has a duty to mitigate damages. If the claimant has insurance or can afford to repair the car prior to payment of the claim by GAO, the claimant must pay the repair bill. Any additional damages for loss of use due to delay in payment by GAO may be settled in a reconsideration of the claim after payment by GAO.

If the claimant is entitled to claim loss of use under state law, there are several methods to minimize the impact of delay due to forwarding the claim to GAO for payment. First of all, promptly settle the claim and certify it for payment. If the claim involves hidden damage or open items, and the amount that can be estimated is \$2500.00 or less, settle the claim, and then pay the balance on reconsideration. Above all, negotiate with the claimant. Perhaps the claimant does not really need or want a replacement vehicle.

The above discussion about loss of use applies only to claims settled under chapter 4. Loss of use is not payable under chapter 11 (AR 27-20, para. 11-5d).

Many body shops estimate repair jobs using the factory list price for new parts from the estimating guide, then repair the car with discounted, used, or reconditioned parts. In many cases, the claimant is not entitled to replacement of damaged parts with new parts, if used parts will return a used car to substantially the same condition as it was in before the accident. Rechromed bumpers, used wheel covers, fenders, and other non-moving parts are routinely used by body shops. Always negotiate this point with the body shop and the claimant.

Glass is almost always subject to a substantial discount. The insurance industry enjoys a substantial discount for the cost of glass; insist on the same discount. You should check repair shops that specialize in replacing glass to determine their estimate to repair glass. It may be substantially less than that charged by a body shop or car dealership.

Always deduct for fair wear and tear on tires, and be sure the replacement is with the same type and quality of tire. A tire depth gauge is available to measure the depth of existing tread. A call to a store that sells the same tires will allow a claims examiner to accurately determine the wear on the tire. Avoid allowing a body shop or car dealership to

list a price for tires when the claimant can purchase them elsewhere at a discount.

The claimant is entitled to recover the cost to repaint an area damaged in a collision. Sometimes a body shop will allege that the entire car must be repainted so the paint will match; make the body shop justify this claim. Automobile identification numbers include codes identifying the paint applied during manufacture. A body shop uses these codes to mix paint to match the existing paint job. If the paint cannot be mixed to match, it may be because the existing paint has oxidized or weathered. In such a case, you should take a deduction for appreciation from the estimate because the claimant is in a better position than before the damage to the car. Determine the deduction by using the rule contained in the depreciation guide in the USARCS Claims Manual, ch 1, app. B, No. 8. Note: disregard the maximum payment provision in settling a claim under chapters 3 or 4.

Requiring a claimant to obtain two or more estimates will not solve the problems associated with damage estimates. In many areas, especially smaller towns, operators of

repair shops act as a fraternity. The shop writing the second estimate will write a higher estimate, knowing that the other shop would do the same. Also, some shops have pads of estimate forms with the letterheads of other body shops, allowing them to write estimates for other companies. One body shop manager explained this practice to me as a "courtesy" extended by the body shops to each other. There is also a risk that the claimant will not disclose a low estimate, and turn in high estimates with the claim.

Claims offices that process a significant number of automobile damage claims should aggressively evaluate automobile damage estimates. Subscribe to an estimating guide in order to check damage estimates. The estimating guide is simple to understand and use. It is common practice for insurance companies to require their adjusters to check estimates using an estimating guide, and to aggressively question estimates. Once your claims examiners start checking estimates, you may be surprised to find out that the body shops have known all along that you did not have a "crash book" and did not aggressively check estimates.

Notice of Loss or Damage

Phyllis Schultz

Attorney-Advisor, Personnel Claims Recovery Branch

Two years ago, a new Military-Industry Memorandum of Understanding was implemented, instituting a new system of carrier notification. For damage or loss discovered at delivery, DD Form 619-1 (Statement of Accessorial Services Performed) was replaced by DD Form 1840 (Joint Statement of Loss or Damage at Delivery), and for loss or damage discovered after delivery, the old DD Form 1840 (Notice of Loss or Damage) was replaced by DD Form 1840R (Notice of Loss or Damage). These new forms are printed in carbon sets of five with DD Form 1840 on the front side and DD Form 1840R on the reverse side.

The purpose of the new Notice of Loss or Damage is to inform the carrier, within seventy-five days of delivery, exactly which items might be involved in a future claim. On the old DD Form 1840, the notice of missing or damaged items discovered after delivery was dispatched to the carrier within forty-five days of delivery, but there was no description of damage given and the number of items involved was merely an estimated amount. The actual claim that followed often involved a far greater number of items than was originally estimated. Carriers agreed to extend the notice period from 45 to 75 days in exchange for the security of knowing which specific items might be involved in a future claim and a general description of the damage or loss to each item. Under the new system, the total number of items on any claim, excluding a few minor exceptions, would be, at a maximum, all the items noted at delivery on DD Form 1840 plus those noted on DD Form 1840R dispatched within seventy-five days of delivery.

The military services agreed to the new DD Form 1840R because the claimant was given thirty extra days to report loss or damage, and the specificity of the new form would reduce the time-consuming correspondence between claims

personnel of the military services and carriers disputing the number and kind of items involved.

In evaluating the new system after two years of operation, it is apparent that disputes between the Army and carriers concerning the number of items involved have been virtually eliminated. Therefore, carrier recovery has become a faster and more efficient process. Certain problems have arisen, however, involving the proper completion of DD Form 1840R. These problems are impeding the collection of carrier recovery money. The following suggestions are offered to assist claims personnel and claimants to correctly complete DD Form 1840R. It should be noted that a slightly modified DD Form 1840R will be in use in the Spring of 1988. Reference will be made to both forms where applicable.

Reverse carbons. After the carrier and soldier complete DD Form 1840 at delivery, the carrier leaves the soldier three of the five forms so that loss and damage discovered after delivery may be noted on DD Form 1840R, the reverse side of DD Form 1840. It is imperative that carbons between the copies of DD Form 1840R be reversed before any entries are made on DD Form 1840R. Claims personnel must examine all copies of DD Form 1840R to ensure that this has been done. If a claimant failed to reverse carbons, the two copies that are incorrect must be annotated to reflect the same information as indicated on the top copy of DD Form 1840R. The revised DD Form 1840R will contain a reminder that carbons must be reversed before using.

Press down hard when completing forms. Because the combination DD Form 1840/1840R is initially a five page form (i.e., original and four copies) and then a three page

form (i.e., original and two copies), it is extremely important that the claimant and claims personnel press down very hard when completing these forms so that a legible impression is made on all copies. Check all copies for readability. Recovery claims personnel at U.S. Army Claims Service have found many DD Forms 1840R impossible to read and of absolutely no use in assessing carrier liability.

Enter dates of delivery and dispatch. (Boxes 1e and 3a DD Form 1840R and boxes 1c and 3b revised DD Form 1840R). These dates must be filled in as they are crucial to proving that the required notice was dispatched to the carrier within 75 days of delivery. When the date-of-dispatch box is left empty, carriers deny all liability, claiming that DD Form 1840R was never received, and cite the blank dispatch date to prove their point.

List all inventory numbers (Box 2a). When an item is discovered missing after delivery, the DD Form 1840R is used to request tracer action. For a carrier to comply with this request, it is vital that correct inventory numbers be supplied in the appropriate boxes, so that, for example, a missing end table may be matched up with an end table, bearing the same number, that was left on the van or at the warehouse.

The correct listing of inventory numbers is equally important for damaged items. A shipment may include six dining room chairs, of which one was noted as "scratched" on the inventory at pickup. The soldier claims that a dining room chair was delivered "scratched," but fails to list an inventory number. This "scratch" damage may well have occurred to a nondamaged chair, but proof is lacking and the carrier will inevitably deny liability, claiming the damage was preexisting. It is vital that all inventory numbers be filled in. Too many DD Forms 1840R have been forwarded without any inventory numbers at all.

Name items correctly (Box 2b). Because carrier liability for most shipments other than domestic (in CONUS) moves is predicated on the agreed item weight found in the Joint Military-Industry Table of Weights, it is critical that items noted on the claim be correctly named. If an item is a schrank, list it as such. Some claimants mistakenly list a schrank as a wall unit, which carries much lower liability. The same applies to hideabed sofas and ordinary sofas. The maximum liability for a hidabed is \$126, while the maximum liability for a sofa is \$72. Correctly naming and describing an item is crucial to achieving maximum recovery. This particularly applies to beds, chairs, desks, tables, televisions, dressers, carpets, appliances, etc. (See Schultz, *Size is Vital*, The Army Lawyer, Mar. 1987, at 56).

Adequately describe loss or damage (Box 2c). Though a general description of loss or damage is requested in this box, many DD Forms 1840R are submitted with this box completely blank. It is, therefore, impossible to establish if the property owner is claiming loss or damage, and impossible for a carrier to determine if tracer action for lost items is in order. It is mandatory that the word "missing" be entered for items that are lost. For damaged items, the request for a general description of the damage involved does not merely mean listing the word "damaged." When the sole word "damaged" appears, carriers invariably deny

liability claiming the damage is the same as whatever damage appears on the origin inventory. Be as specific as possible in listing the type and location of the damage. Claims personnel should make sure that the Claims Analysis Chart, DD Form 1844, generally corresponds to the damage claimed on DD Form 1840/1840R. Carriers refuse to pay when the DD Form 1840/1840R lists a dining room chair as "rubbed, chipped, and marred," but the ultimate claim is for "leg missing." On mechanical objects such as sewing machines, merely listing the word "broken" does not give the carrier notice whether the mechanical malfunction was due to external damage, which the carrier caused, and therefore would be liable, or due to mechanical problems without external damage, for which carrier is not liable.

Some claimants mistakenly add damage discovered after delivery to the DD Form 1840 instead of on the Form 1840R. Claims personnel must check the DD Form 1840 to see if any entries are in original ink. Because entries on DD Form 1840 should be in carbon, it is a sign that these were probably added after delivery. If original ink entries are noted, have the claimant add these to DD Form 1840R so that the carrier receives notice for all items involved.

List continuation sheets. If a continuation sheet is used to list more damage than space allows on the DD Form 1840R, be sure to indicate, "See Continuation Sheet(s)" on the last line of section two of the DD Form 1840R and note how many pages of continuation sheets are included. All continuation sheets must have the claimant's name, GBL number or other applicable contract number, and be signed, dated, and numbered. The revised DD Form 1840R will have a space at the bottom to indicate the number of pages used.

Enter correct names and addresses. Box 3 of DD Form 1840R and box 3a of the revised DD Form 1840R require the name and address of the carrier. This can be obtained by copying the name and address listed by the carrier on DD Form 1840 on the reverse side. (See box 8 of DD Form 1840 and box 9 of the revised DD Form 1840.) Ensure that boxes 4 a-d on DD Form 1840R, listing the claims officer and claims office address, are completely filled out and dated.

If a claimant discovers further loss or damage after dispatch of DD Form 1840R but before the 75-day notice period has expired, a supplemental DD Form 1840R may be sent as long as the form is dispatched within the correct time period. Any supplemental DD Form 1840R should indicate that it is a supplemental form. All required information should be entered on the supplemental form as on the original.

To achieve maximum recovery, it is vital that the above suggestions be followed when completing DD Form 1840R. Basically, all that has to be done to solve most deficiencies noted since the implementation of DD Form 1840R is to ensure that nothing is left blank on DD Form 1840R. If all the boxes are filled in with the correct information, a noteworthy reduction in time-consuming negotiations and an appreciable increase in total recovery should ensue, giving the Army more money to pay future claims.

Claims Notes

Affirmative Claims Note

Recovery judge advocates pursuing medical care recovery cases should ensure that all applicable CHAMPUS contractor processing offices are providing their claims offices with complete cost data for inpatient or outpatient medical services provided by civilian sources to injured parties.

Because of courses of treatment where patients receive care from physicians, pharmacies, medical suppliers, or laboratories in various states, CHAMPUS cost data may be processed by more than one contractor. Therefore, it is advisable to consider the completeness of cost data in hand and seek possible augmented reports before making a final assertion or compromising the government's lien. This is particularly true in cases where an injured party may have been transferred during the course of treatment.

Listed below are the current CHAMPUS contractor processing offices and their respective state jurisdictions of responsibility. Deficiencies in CHAMPUS reporting need to be documented by USARCS, and RJs are encouraged to report particular incidents or problems to the Affirmative Claims Branch (AV 923-7526).

Blue Cross Blue Shield of South Carolina
P.O. Box 100502
Florence, S.C. 29501-0502
1-800-334-0308

Alabama	Florida	Puerto Rico
Arizona	Georgia	South America
Bermuda	Mexico	Tennessee
California	Mississippi	West Indies
Canada	Nevada	
Central America	New Mexico	

Blue Cross/Washington/Alaska
P.O. Box 77084
Seattle, WA 98177
1-800-426-1337, 9250, 8802, 1312

Alaska	Nebraska	Utah
Colorado	North Dakota	Washington
Idaho	Oregon	Wyoming
Montana	South Dakota	

Wisconsin Physicians Service
P.O. Box 7938
Madison, WI 53708-7938
1-800-356-5954

Arkansas	Maryland	Pennsylvania
Delaware	Missouri	South Carolina
District of Columbia	North Carolina	Texas
Kansas	Oklahoma	Virginia
Louisiana		

Blue Cross Blue Shield, Rhode Island
P.O. Box 1704
Providence, RI 02901
1-800-622-3131

Connecticut	Michigan	Vermont
Illinois	Minnesota	West Virginia

Indiana	New Hampshire	Wisconsin
Iowa	New Jersey	All Christian Science
Kentucky	New York	Claims Worldwide
Maine	Ohio	
Massachusetts	Rhode Island	

Hawaii Medical Service Association
P.O. Box 860
Honolulu, Hawaii 96808

Hawaii
OCHAMPUSPAC

Korea Republic of China Thailand

Office of CHAMPUS—Europe
144 Karlsruhe Estrasse
6900 Heidelberg
West Germany
or
OCHAMPUSEUR
APO New York 09102

Europe Africa Middle East

Personnel Claims Note

Army claims training continues to emphasize use of the Small Claims procedures, which is applicable to claims that can be settled for less than \$1000 and do not require extensive investigation. Some claims offices have not fully implemented the Small Claims Procedure.

The Small Claims Procedure requires the claims office, at the time claims are received, to distinguish claims that can be settled quickly from claims that require more extensive processing. These claims are separated out as a service to the soldier and processed as soon as possible, often within one working day. The Small Claims Procedure is a necessary tool to show the soldier that "the system" is responsive and is receiving considerable attention at high levels within the Army. "First-in," first-out" processing of all claims received, large or small, is contrary to Army policy as stated in Personnel Claims Bulletin 58, USARCS Claims Manual. It is not fair to the soldier who does not have a small claim, however, to let his or her claim languish while small claims get pushed through the system. Claims offices must develop management systems to guard against such a result.

Where local resources permit, instead of using formal adjudication techniques, the claims office should allow the claims examiner to adjudicate the claim on the spot, with the claimant present to answer questions and understand the basis for payment. Evidentiary requirements can be relaxed slightly, with greater emphasis placed on substantiating the value of property using catalog prices, telephonic communications, and agreed cost of repair procedures based upon the face-to-face contact. Of necessity, this requires the person initially counselling the claimant in person or over the telephone to have sufficient experience to recognize a "small claim" and to tell the claimant what substantiation is needed before setting up an appointment with the examiner.

The claims office must also persuade the servicing finance and accounting office to make maximum use of cash payment procedures so the soldier is paid within a short time after the claims office certifies payment. It does the claimant little good to have a claim adjudicated within a day

only to wait three weeks for the check. The Comptroller of the Army has issued guidance to this effect, as outlined in Personnel Claims Bulletin 58.

Efforts continue to educate representatives of the carrier industry that the Small Claims Procedure is not a "give-away" program, but a necessary means for the claims office to channel investigative effort into those claims that require investigation, regardless of amount, and still accomplish the overall mission of serving the soldier. Small Claims Procedures will receive attention in Claims Assistance Visits and Article 6 visits. Now is an excellent time for claims offices to take a hard look at how they can improve their use of the Small Claims Procedure.

For questions concerning the Small Claims Procedure or other personnel claims issues, contact either of the attorneys at the Personnel Claims Branch, Captain Elizabeth Gilmore or Bob Ganton, AV 923-3229/4240/7784.

Claims Management Notes

Claims Assistance From Europe

CONUS claims offices needing claims assistance and information from claims offices in Europe can contact the U.S. Army Claims Service, Europe (USACSEUR) for assistance. Captain Maria Fernandez-Greczmiel, Chief, Personnel Claims, USACSEUR, (and her successor in that duty position after June 1988) has been designated as the point of contact for CONUS claims offices needing claims assistance from any claims office within Europe. This pertains to personnel, tort, and affirmative claims. The telephone number is AUTOVON 380-7630 or 6540.

Claims Manual Change 7

In late December 1987, USARCS mailed copies of Change 7 to the Claims Manual to all Claims Manual holders of record. The following changes are contained in Change 7:

Chapter 1, Personnel Claims, Bulletin #66 is revised, and Bulletins #100 (Borrowed Vehicles) and #101 (Articles Acquired for Sale or Business Use) are added.

Chapter 2, Household Goods Recovery, Bulletin #9 (Revised Nontemporary Storage Claims Processing Procedures) and Bulletin #10 (Computing Recovery of Increased Released Valuation) are added.

Chapter 4, Torts—United States, Bulletin #4 (Property Damage Due to Air Blast or Ground Shock) is added.

Chapter 10, Automation/Information Management, chapter introduction and table of contents is revised, Bulletin #1 is replaced with Claims Automation Bulletin #1, appendices A-C are deleted and a new Appendix A is added.

For a listing of the general contents of all previous changes, see *The Army Lawyer*, Oct. 1987, at 61 (change 6), *The Army Lawyer*, Aug. 1987, at 67 (change 5), and *The Army Lawyer* June 1987, at 49 (changes 1 through 4).

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Update to 1988 Academic Year On-Site Schedule

The following information updates the 1988 academic year Continuing Legal Education (On-Site) Training Schedule published in the July and October 1987 editions of *The Army Lawyer*.

1. The Kansas City on-site scheduled for 12 and 13 March has been canceled. Officers affected by this change may attend on-site training at alternate locations listed in the July issue of *The Army Lawyer*, at 67.

2. The action officer for the Columbia, South Carolina on-site has been changed to Major Edward J. Hamilton, Jr., South Carolina National Bank, Room 252, 101 Greystone Blvd., Columbia SC 29226, (803) 765-3227 (work) and (803) 749-1635 (home).

3. The training site for the Nashville, TN on-site has been changed to the Vanderbilt Plaza Hotel.

4. The training site for the Miami on-site will be the Biscayne Bay Marriott Hotel and Marina.

5. The phone number for Mr. Rusty Cooper, the POC of the Oxford, Mississippi on-site is (601) 232-7282.

6. The action officer for the Chicago on-site has been changed to 1Lt Louis Aldini, 901 Red Fox Lane, Oak Brook, Illinois 60521, (312) 961-9500 ext 1543.

Teaching Opportunity for IRR Judge Advocates

JAGC officers from the Individual Ready Reserve (IRR) are needed to teach legal subjects in the ROTC, Reserve Forces Schools, and ARNG academies. The intent of the program is to ensure higher quality military justice and law of war instruction by having those subjects taught by practicing lawyers who are well-versed in the intricacies of military law.

Officers volunteering for the program will be provided retirement points. The officers would not supplant the primary course instructor, but would be available to assist as required. At the training institution's request, they would serve as the primary instructors of military justice and law of war subjects, act as assistant instructors, facilitators, subject matter resources, or instructor trainers.

For further information about this opportunity, call the Guard and Reserve Affairs Department, 800-654-5914, extension 386, or AUTOVON 274-7110, extension 972-6386 (Mrs. Lee Park).

Constructive Credit Rules for Nonresident C&GSC

The U.S. Army Command and General Staff College (C&GSC) at Fort Leavenworth allows graduates of the resident Judge Advocate Officer Graduate Course to receive constructive credit for subcourses in staff communication, military law, and leadership when enrolling in the correspondence course, or nonresident, C&GSC option. Judge advocates must apply for nonresident C&GSC within three years of completion of the graduate course to qualify for the constructive credit.

The constructive credit option only applies to graduates of the resident Graduate Course. It does not apply to graduates of the nonresident Judge Advocate Officer Advanced Course (JAOAC). Reserve Component officers who have graduated from the resident Graduate Course within the last three years who are interested in C&GSC constructive credit should send their requests to Department of the Army, C&GSC, ATTN: School of Corresponding Studies, Fort Leavenworth, Kansas 66027-6900. A copy of the official transcript showing completion of the Graduate Course must be submitted with the request for credit. Questions may be directed to the C&GSC Registrar at AUTOVON 552-5407 or commercial (913) 684-5407.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. If you have not received a welcome letter or packet, you do not have a quota. Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. Classified Training: Secret or Higher Clearance Required

Students attending the 3d Advanced Acquisition Course (5F-F17) from 4-8 April 1988, must have a valid Secret security clearance. Travel orders or other documentation must clearly establish the student's current security clearance, which can not be lower than a Secret clearance. No student will be allowed to attend this course without a Secret clearance. There will be no exceptions to this policy.

3. TJAGSA CLE Course Schedule

March 7-11: 12th Administrative Law for Military Installations Course (5F-F24).

March 14-18: 38th Law of War Workshop (5F-F42).

March 21-25: 22nd Legal Assistance Course (5F-F23).

March 28-April 1: 93rd Senior Officers Legal Orientation Course (5F-F1).

April 4-8: 3rd Advanced Acquisition Course (5F-F17).

April 12-15: JA Reserve Component Workshop.

April 18-22: Law for Legal Noncommissioned Officers (512-71D/20/30).

April 18-22: 26th Fiscal Law Course (5F-F12).

April 25-29: 4th SJA Spouses' Course.

April 25-29: 18th Staff Judge Advocate Course (5F-F52).

May 2-13: 115th Contract Attorneys Course (5F-F10).

May 16-20: 33rd Federal Labor Relations Course (5F-F22).

May 23-27: 1st Advanced Installation Contracting Course (5F-F18).

May 23-June 10: 31st Military Judge Course (5F-F33).

June 6-10: 94th Senior Officers Legal Orientation Course (5F-F1).

June 13-24: JATT Team Training.

June 13-24: JAOAC (Phase VI).

June 27-July 1: U.S. Army Claims Service Training Seminar.

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-29: 116th Contract Attorneys Course (5F-F10).

July 18-22: 17th Law Office Management Course (7A-713A).

July 25-September 30: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1-May 20, 1989: 37th Graduate Course (5-27-C22).

August 15-19: 12th Criminal Law New Developments Course (5F-F35).

September 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually

Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Dakota	1 February in three year intervals
Oklahoma	1 April annually
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1988 issue of The Army Lawyer.

5. Civilian Sponsored CLE Courses

May 1988

- 1-5: NCDA, Trial Advocacy, Philadelphia, PA.
- 4-5: WTI, International Joint Ventures: Business Alternatives and Legal Considerations, Washington, D.C.
- 4-6: MBC, Conference on Child Abuse and Neglect, Columbia, MO.
- 5-6: SMU, Multistate Labor and Employment Law, Lake Buena Vista, FL.
- 5-6: SLF, Wills and Probate Institute, Dallas, TX.
- 5-6: PLI, Real Estate and the Bankruptcy Code, New York, NY.
- 5-6: PLI, Hazardous Waste Litigation, Los Angeles, CA.
- 5-6: ALIABA, New England Computer Law Conference, Boston, MA.
- 5-6: ALIABA, Antitrust Law, San Francisco, CA.
- 6: MBC, Sources of Proof, Kansas City, MO.
- 6-7: ALIABA, Unfair Competition, Trademarks, and Copyrights, Washington, D.C.
- 6-8: FBI, A Festival of Law, New Orleans, LA.
- 7-8: FBI, 13th Annual Indian Law Conference, Albuquerque, NM.
- 9-10: WTI, International Tax and Estate Planning, New York, NY.
- 9-11: GCP, Patents, Technical Data & Computer Software, Washington, D.C.
- 10-13: ESI, ADP Contracting, Washington, D.C.
- 10-20: SLF, Oil & Gas Law & Taxation Short Course, Dallas, TX.
- 11-20: UKCL, Trial Advocacy Course, Lexington, KY.
- 12-13: PLI, Commercial Real Estate Leases, New York, NY.
- 12-13: USCLC, Computer Law Institute, Los Angeles, CA.

- 12-14: ALIABA, Investment Company Regulation and Compliance, Boston, MA.
- 12-14: ALIABA, Fundamentals of Bankruptcy Law, Boston, MA.
- 13: MBC, Sources of Proof, St. Louis, MO.
- 15-16: PLI, Corporate Counsel Invitational Workshop, New York, NY.
- 16-17: FBA, Government Contracts Briefing Conference, Washington, D.C.
- 16-17: PLI, Construction Contracts and Litigation, Chicago, IL.
- 16-20: SLF, Labor Law and Labor Arbitration Short Course, Dallas, TX.
- 16-20: GCP, Contracting with the Government, Los Angeles, CA.
- 17: MICLE, Commercial Foreclosure & Deeds in Lieu of Foreclosure, Grand Rapids, MI.
- 17: PBI, Civil Litigation Update, Stroudsburg, PA.
- 17-20: ESI, ADP Contracting, San Jose, CA.
- 18: PBI, Pennsylvania Realty Transfer Tax, Kittanning, PA.
- 19: MICLE, Commercial Foreclosure & Deeds in Lieu of Foreclosure, Troy, MI.
- 19-20: PLI, Real Estate and the Bankruptcy Code, San Francisco, CA.
- 19-20: BNA, Executive Benefits, Washington, D.C.
- 19-20: PLI, Acquiring or Selling the Privately Held Company, New York, NY.
- 19-20: SMU, Civil Trial Short Course, San Antonio, TX.
- 20: UMKC, Federal Estate Planning Symposium, Kansas City, MO.
- 20: NKU, Social Security and the Law of the Elderly, Highland Heights, KY.
- 20: PBI, Administration of Estates, Altoona, PA.
- 21-22: FBA, 12th Annual Tax Law Conference, Washington, D.C.
- 23-24: BNA, Employee Testing, Washington, D.C.
- 23-24: WTI, Introduction to International Taxation, Boston, MA.
- 23-26: ESI, Contract Accounting and Financial Management, Washington, D.C.
- 25-27: WTI, Intermediate Seminar on International Taxation, Boston, MA.

For further information on civilian courses, please contact the institution offering the course, as listed below:

- AAA: American Arbitration Association, 140 West 51st Street, New York, NY 10020. (212) 484-4006.
- AAJE: American Academy of Judicial Education, Suite 903, 2025 Eye Street, N.W., Washington, D.C. 20006. (202) 775-0083.
- ABA: American Bar Association, National Institutes, 750 North Lake Shore Drive, Chicago, IL 60611. (312) 988-6200.
- ABICLE: Alabama Bar Institute for Continuing Legal Education, Box CL, University, AL 35486. (205) 348-6280.
- AICLE: Arkansas Institute for Continuing Legal Education, 400 West Markham, Little Rock, AR 72201. (501) 371-2024.
- AKBA: Alaska Bar Association, P.O. Box 279, Anchorage, AK 99501.
- ALIABA: American Law Institute-American Bar Association Committee on Continuing Professional Education, 4025 Chestnut Street, Philadelphia, PA 19104. (800) CLE-NEWS: (215) 243-1600.

ARBA: Arkansas Bar Association, 400 West Markham Street, Little Rock, AR 72201. (501)371-2024.

ASLM: American Society of Law and Medicine, 765 Commonwealth Avenue, Boston, MA 02215. (617)262-4990.

ATLA: The Association of Trial Lawyers of America, 1050 31st St., N.W. Washington, D.C. 20007. (800)424-2725; (202)965-3500.

BLI: Business Laws, Inc., 8228 Mayfield Road, Chesterfield, OH 44026. (216)729-7996.

BNA: The Bureau of National Affairs Inc., 1231 25th Street, N.W., Washington, D.C. 20037. (800)424-9890 (conferences); (202)452-4420 (conferences); (800)372-1033; (202)258-9401.

CCEB: Continuing Education of the Bar, University of California Extension, 2300 Shattuck Avenue, Berkeley, CA 94704. (415)642-0223; (213)825-5301.

CCLE: Continuing Legal Education in Colorado, Inc., Huchingson Hall, 1895 Quebec Street, Denver, CO 80220. (303)871-6323.

CICLE: Cumberland Institute for Continuing Legal Education, Samford University, Cumberland School of Law, 800 Lakeshore Drive, Birmingham, AL 35209.

CLEW: Continuing Legal Education for Wisconsin, 905 University Avenue, Suite 309, Madison, WI 53706. (608)262-3833.

DRI: The Defense Research Institute, Inc., 750 North Lake Shore Drive, #5000, Chicago, IL 60611. (312) 944-0575.

ESI: Educational Services Institute, 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3203. (703) 379-2900.

FB: The Florida Bar, Tallahassee, FL 32301.

FBA: Federal Bar Association, 1815 H Street, N.W., Washington, D.C. 20006. (202) 638-0252.

FJC: The Federal Judicial Center, Dolly Madison House, 1520 H Street, N.W., Washington, D.C. 20003.

FPI: Federal Publications, Inc., 1725 K Street, N.W., Washington, D.C. 20036. (202) 337-7000.

GCP: Government Contracts Program, The George Washington University, Academic Center, T412, 801 Twenty-second Street, N.W., Washington, D.C. 20052. (202) 676-6815.

GICLE: The Institute of Continuing Legal Education in Georgia, University of Georgia School of Law, Athens, GA 30602.

GULC: Georgetown University Law Center, CLE Division, 25 E Street, N.W., 4th Fl., Washington, D.C. 20001. (202) 624-8229.

HICLE: Hawaii Institute for Continuing Legal Education, c/o University of Hawaii, Richardson School of Law, 2515 Dole Street, Room 203, Honolulu, HI 96822.

ICLEF: Indiana Continuing Legal Education Forum, Suite 202, 230 East Ohio Street, Indianapolis, IN 46204.

IICLE: Illinois Institute for Continuing Legal Education, 2395 W. Jefferson Street, Springfield, IL. 62702. (217)787-2080.

ILT: The Institute for Law and Technology, 1926 Arch Street, Philadelphia, PA 19103.

IPT: Institute for Paralegal Training, 1926 Arch Street, Philadelphia, PA 19103. (215) 732-6999.

KBA: Kansas Bar Association CLE, P.O. Box 1037, Topeka, KS 66601. (913)234-5696.

KCLE: University of Kentucky, College of Law, Office of Continuing Legal Education, Lexington, KY 40506. (606)257-2922.

LEI: The Legal Education Institute, 1875 Connecticut Avenue, N.W., Suite 1034, Washington, D.C. 20530. (202)673-6372/FTS-673-6372.

LSBA: Louisiana State Bar Association, 210 O'Keefe Avenue, Suite 600, New Orleans, LA 70112. (800)421-5722; (504)566-1600.

LSU: Center of Continuing Professional Development, Louisiana State University Law Center, Room 275, Baton Rouge, LA 70803. (504)388-5837.

MBC: The Missouri Bar Center, 326 Monroe, P.O. Box 119, Jefferson City, MO 65102. (314)635-4128.

MCLE: Massachusetts Continuing Legal Education, Inc., 44 School Street, Boston, MA 02109. (800)632-8077; (617)720-3606.

MIC: The Michie Company, P.O. Box 7587, Charlottesville, VA 22906. (800)446-3410; (804)295-6171.

MICLE: Institute of Continuing Legal Education, University of Michigan, Hutchins Hall, Ann Arbor, MI 48109-1215. (313)764-0533; (800)922-6516.

MLI: Medi-Legal Institute, 15301 Ventura Boulevard, Suite 300, Sherman Oaks, CA 91403. (800)433-0100.

MNCLE: Minnesota CLE, 40 North Milton, St. Paul, MN 55104. (612)227-8266.

MSBA: Maine State Bar Association, 124 State Street, P.O. Box 788, Augusta, ME 04330.

NATCLE: National Center for Continuing Legal Education, Inc., 431 West Colfax Avenue, Suite 310, Denver, CO 80204.

NCBAF: North Carolina Bar Association Foundation, Inc., 1025 Wade Avenue, P.O. Box 12806, Raleigh, NC 27605.

NCDA: National College of District Attorneys, College of Law, University of Houston, Houston, TX 77004. (713)749-1571.

NCJJ: National College of Juvenile Justice, University of Nevada, P.O. Box 8978, Reno, NV 89507-8978. (702)784-4836.

NCLE: Nebraska Continuing Legal Education, Inc., 1019 American Charter Center, 206 South 13th Street, Lincoln, NB 68508.

NELI: National Employment Law Institute, 444 Magnolia Avenue, Suite 200, Larkspur, CA 94939. (415) 924-3844.

NITA: National Institute for Trial Advocacy, 1507 Energy Park Drive, St. Paul, MN 55108. (800)225-6482; (612)644-0323 in MN and AK.

NJC: National Judicial College, Judicial College Building, University of Nevada, Reno, NV 89557. (702) 784-6747.

NJCLE: New Jersey Institute for Continuing Legal Education, 15 Washington Place, Newark, NJ 07102-3105.

NKU: Northern Kentucky University, Chase College of Law, Office of Continuing Legal Education, Highland, Hts., KY 41011. (606) 572-5380.

NLADA: National Legal Aid & Defender Association, 1625 K Street, N.W., Eighth Floor, Washington, D.C. 20006. (202) 452-0620.

NMTLA: New Mexico Trial Lawyers' Association, P.O. Box 301, Albuquerque, NM 87103. (505)243-6003.

NUSL: Northwestern University School of Law, 357 East Chicago Avenue, Chicago, IL 60611. (312) 908-8932.

NYSBA: New York State Bar Association, One Elk Street, Albany, NY 12207. (518)463-3200; (800) 582-2452 (books only).

NYSTLA: New York State Trial Lawyers Association, Inc., 132 Nassau Street, New York, NY 10038. (212)349-5890.

NYULS: New York University, School of Law, Office of CLE, 715 Broadway, New York, NY 10003. (212)598-2756.

NYUSCE: New York University, School of Continuing Education, 11 West 42nd Street, New York, NY 10036. (212) 580-5200.

OLCI: Ohio Legal Center Institute, P.O. Box 8220, Columbus, OH 43201-0220. (614) 421-2550.

PBI: Pennsylvania Bar Institute, 104 South Street, Harrisburg, PA 17108-1027. (800) 932-4637 (PA only); (717) 233-5774.

PLI: Practising Law Institute, 810 Seventh Avenue, New York, NY 10019. (212) 765-5700 ext. 271.

PTLA: Pennsylvania Trial Lawyers Association, 1405 Locust Street, Philadelphia, PA 19102.

SBA: State Bar of Arizona, 234 North Central Avenue, Suite 858, Phoenix, AZ 85004. (602)252-4804.

SBM: State Bar of Montana, 2030 Eleventh Avenue, P.O. Box 4669, Helena, MT 59601.

SBT: State Bar of Texas, Professional Development Program, P.O. Box 12487, Austin, TX 78711. (512)475-6842.

SCB: South Carolina Bar, Continuing Legal Education, P.O. Box 11039, Columbia, SC 29211.

SLF: Southwestern Legal Foundation, P.O. Box 830707, Richardson, TX 75080-0707. (214)690-2377.

SMU: Southern Methodist University, School of Law, Office of Continuing Legal Education, 130 Storey Hall, Dallas, TX 75275. (214)692-2644.

SPCCL: Salmon P. Chase College of Law, Committee on CLE, Nunn Hall, Northern Kentucky University, Highland Heights, KY 41076 (606) 527-5380.

TBA: Tennessee Bar Association, 3622 West End Avenue, Nashville, TN 37205.

TLEI: The Legal Education Institute, 1875 Connecticut Avenue, N.W., Suite 1034, Washington, D.C. 20530.

TLS: Tulane Law School, Joseph Merrick Jones Hall, Tulane University, New Orleans, LA 70118. (504)865-5900.

TOURO: Touro College, Continuing Education Seminar Division Office, Fifth Floor South, 1120 20th Street, N.W., Washington, D.C. 20036, (202)337-7000.

UCCI: The Uniform Commercial Code Institute, P.O. Box 812, Carlisle, PA 17013.

UDCL: University of Denver College of Law, Program of Advanced Professional Development, 200 West Fourteenth Avenue, Denver, CO 80204.

UHCL: University of Houston, College of Law, Central Campus, Houston, TX 77004. (713)749-3170.

UKCL: University of Kentucky, College of Law, Office of CLE, Suite 260, Law Building, Lexington, KY 40506. (606) 257-2922.

UMC: University of Missouri-Columbia School of Law, Office of Continuing Legal Education, 114 Tate Hall, Columbia, MO 65211.

UMCC: University of Miami Conference Center, School of Continuing Studies, 400 S.E. Second Avenue, Miami, FL 33131. (305)372-0140.

UMKC: University of Missouri-Kansas City, Law Center, 5100 Rockhill Road, Kansas City, MO 64110. (816)276-1648.

UMLS: University of Miami School of Law, P.O. Box 248105, Coral Gables, FL 33124. (305)284-5500.

USB: Utah State Bar, 425 East First South, Salt Lake City, UT 84111.

USCLC: University of Southern California Law Center, University Park, Los Angeles, CA 90007.

UTSL: University of Texas School of Law, 727 East 26th Street Austin, TX 78705 (512) 471-3663.

VACLE: Committee of Continuing Legal Education of the Virginia Law Foundation, School of Law, University of Virginia, Charlottesville, VA 22901. (804)924-3416.

VUSL: Villanova University, School of Law, Villanova, PA 19085.

WSBA: Washington State Bar Association, Continuing Legal Education, 505 Madison Street, Seattle, WA 98104. (206) 622-6021.

WTC: World Trade Center, One World Trade Center, 55th Floor, New York, NY 10048. (212)466-8284.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the

office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose

organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

- AD B112101 Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-87-1 (302 pgs).
- AD B112163 Contract Law, Government Contract Law Deskbook Vol 2/JAGS-ADK-87-2 (214 pgs).
- AD B100234 Fiscal Law Deskbook/JAGS-ADK-86-2 (244 pgs).
- AD B100211 Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

- AD A174511 Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
- AD B116100 Legal Assistance Consumer Law Guide/JAGS-ADA-87-13 (614 pgs).
- AD B116101 Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
- AD B116102 Legal Assistance Office Administration Guide/JAGS-ADA-87-11 (249 pgs).
- AD B116097 Legal Assistance Real Property Guide/JAGS-ADA-87-14 (414 pgs).
- AD A174549 All States Marriage & Divorce Guide/JAGS-ADA-84-3 (208 pgs).
- AD B089092 All States Guide to State Notarial Laws/JAGS-ADA-85-2 (56 pgs).
- AD B093771 All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
- AD B094235 All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
- AD B114054 All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
- AD B090988 Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
- AD B090989 Legal Assistance Deskbook, Vol II/JAGS-ADA-85-4 (590 pgs).
- AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).
- AD B095857 Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
- AD B116103 Legal Assistance Preventive Law Series/JAGS-ADA-87-10 (205 pgs).
- AD B116099 Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).

Claims

- AD B108054 Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

- AD B087842 Environmental Law/JAGS-ADA-84-5 (176 pgs).
- AD B087849 AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
- AD B087848 Military Aid to Law Enforcement/JAGS-ADA-81-7 (76 pgs).
- AD B100235 Government Information Practices/JAGS-ADA-86-2 (345 pgs).
- AD B100251 Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
- AD B108016 Defensive Federal Litigation/JAGS-ADA-87-1 (377 pgs).
- AD B107990 Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
- AD B100675 Practical Exercises in Administrative and Civil Law and Management/JAGS-ADA-86-9 (146 pgs).

Labor Law

- AD B087845 Law of Federal Employment/JAGS-ADA-84-11 (339 pgs).
- AD B087846 Law of Federal Labor-Management Relations/JAGS-ADA-84-12 (321 pgs).

Developments, Doctrine & Literature

- AD B086999 Operational Law Handbook/JAGS-DD-84-1 (55 pgs).
- AD B088204 Uniform System of Military Citation/JAGS-DD-84-2 (38 pgs).

Criminal Law

- AD B095869 Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS-ADC-85-3 (216 pgs).
- AD B100212 Reserve Component Criminal Law PEs/JAGS-ADC-86-1 (88 pgs).

The following CID publication is also available through DTIC:

- AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 5-23	Army Major Item Systems Management		26 Nov 87
AR 11-2	Internal Control Systems		4 Dec 87
AR 27-40	Litigation		2 Dec 87
AR 40-6	Army Nurse Corps		30 Oct 87
AR 55-355	Defense Traffic Management Regulation: Transportation Facility Guide, Army, Vol. 2		30 Sep 87
AR 600-63	Army Health Promotion		17 Nov 87

AR 601-50	Appointment of Temporary Officers in the Army of U.S. Upon Mobilization		4 Dec 87
AR 680-5	Personnel Information System	101	2 Dec 87
AR 680-29	Military Personnel, Operation and Type of Transaction Codes	101	2 Dec 87
Cir 11-87-4	Internal Control Review Checklists		4 Dec 87
Cir 40-87-1	Professional Specialty Recognition of Army Medical Department Officer and Enlisted Personnel		15 Dec 87
DA Pam 27-26	Rules of Professional Conduct for Lawyers		31 Dec 87
DA Pam 600-63-4	Fit to Win Individual Assessment		Sep 87
DA Pam 700-126	Basic Functional Structure		13 Nov 87
JFTR	Joint Federal Travel Regulations, Vol. 2	266	1 Dec 87

3. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Emshoff & Davidson, *The Effect of "Good Time" Credit on Inmate Behavior: A Quasi-Experiment*, 14 Crim. Just. & Behav. 335 (1987).

Golub & Fenske, *U.S. Government Procurement: Opportunities and Obstacles for Foreign Contractors*, 20 Geo. Wash. J. Int'l L. & Econ. 567 (1987).

Hyman, *Trial Advocacy and Methods of Negotiation: Can Good Trial Advocates Be Wise Negotiators?*, 34 UCLA L. Rev. 863 (1987).

International Symposium on Government Procurement Law, Part I, 20 Geo. Wash. J. Int'l L. & Econ. 415 (1987).

Kaesser, *Major Defense Acquisition Programs: A Study of Congressional Control Over DOD Acquisitions*, 34 Fed. B. News & J. 430 (1987).

Mason, *New "Revolving Door" Restrictions Imposed by the 1986 Defense Appropriations Act*, 34 Fed. B. News & J. 436 (1987).

Rabkin & Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 Stan. L. Rev. 203 (1987).

Symposium Issue on Alternative Dispute Resolution, 14 Pepperdine L. Rev. 769 (1987).

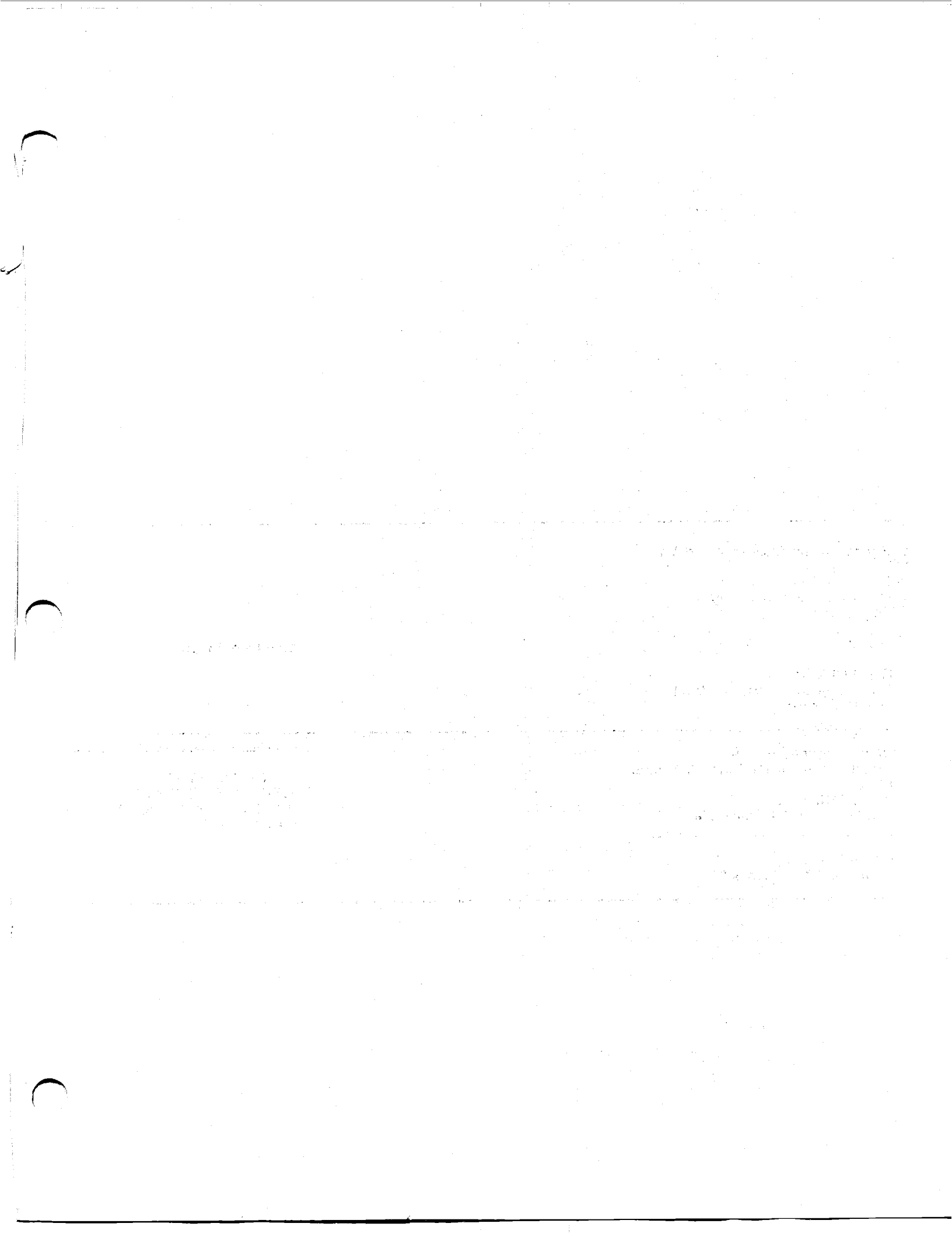
Comment, *The Gulf of Sidra*, 24 San Diego L. Rev. 751 (1987).

Comment, *Victim Rights—Criminal Law: Remembering the "Forgotten Person" in the Criminal Justice System*, 70 Marq. L. Rev. 572 (1987).

Note, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 Mich. L. Rev. 1656 (1987).

Note, *Ex Post Facto Limitations on Changes in Evidentiary Law: Repeal of Accomplice Corroboration Requirements*, 55 Fordham L. Rev. 1191 (1987).

Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching"*, 1 Geo. J. Legal Ethics 389 (1987).



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